This Month's Cover

On this month's cover, we commemorate the two-hundredth anniversary of the birth of Alexander Hamilton (1757-1804), lawyer, soldier and statesman. Of his many services to his country, Hamilton deserves his countrymen's gratitude most for two achievements: first, *The Federalist* (which he wrote along with Jay and Madison), that brilliant series of essays on constitutional government which helped so much in securing the ratification of the Constitution; and, second, his work as first Secretary of the Treasury in establishing a sound financial foundation for the new republic.

February, 1957

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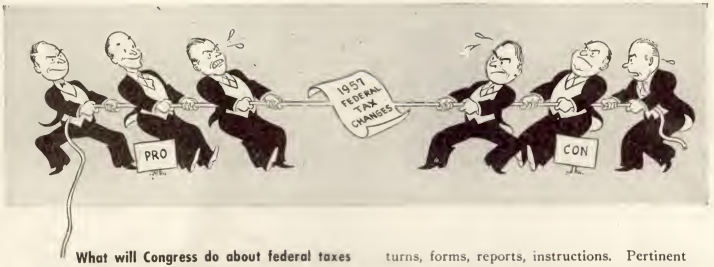

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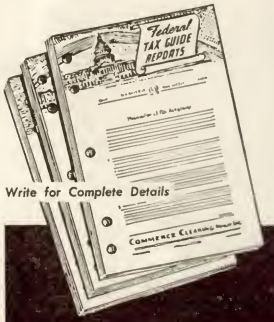

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The President's Page

David F. Maxwell

■ Mrs. Maxwell and I have just returned from an extensive tour of California. Accompanied by Archibald M. Mull, immediate past State Delegate and former President of the California Bar Association, we visited bar associations of ten counties in northern California. Joseph A. Ball, present State Delegate from California and also current President of the California Bar Association, escorted us to three additional counties in the southern part of the state.

The tour included formal speeches before civic groups and bar associations, informal conferences with bar leaders in particular counties, press conferences, television and radio appearances, and a discussion of the problem of judicial selection in California with Goodwin J. Knight, Governor of California. Altogether it was a most stimulating and inspiring experience for which we shall be ever grateful to Messrs. Mull and Ball.

The idea of the President of the Association "barnstorming" California originated in the fertile mind of Arch Mull, who saw through this means a way in which the American Bar Association could be made to seem more real and vital to the lawyers of his state. To the average country lawyer, the American Bar Association seems very remote, Arch believes. Particularly in areas where the local or state bar association is strong, it is difficult for some lawyers to visualize all the things the American Bar Association is doing or can do for them, and why they should join. In most instances, it is impossible for them to attend an annual meeting. Therefore, Arch conceived the idea of bringing the Association to them through the presence of the President.

The first President to ride the circuit under the Mull aegis was Harold Gallagher. Thereafter, Presidents Fowler, Barkdull, Storey, Jameson, Wright and Gambrell have all taken the tour to a greater or lesser extent. Whether this accounts for California's fine standing in proportionate membership may be open to question, but certainly the visit of the President has generated interest in the activities of the Association. It seems to me that the extension of this precedent into other states where the American Bar Association is not particularly strong would be very helpful.

Also out of the experiences of this tour has emanated the idea that our public relations could be given a great boost by bar associations on the state and local level maintaining closer contact with other civic organizations such as chambers of commerce, manufacturers' associations, service clubs and other professional groups. There are many areas in which continuous co-operation with such groups would be in the public interest. Consider, for instance, the problem of judicial selection. Admittedly all reputable civic groups as well as professional organizations are interested in improving the administration of justice. As lawyers, I believe we will concede that the cardinal prerequisite for accomplishing true reform in this field is to take our judges out of politics. Whether it is the American Bar Association Plan, the Missouri Plan, or some equally salutary device is of little moment; what is important is to enlist public support for whatever worthy plan may be designed.

Trying to go it alone has proved a discouraging and expensive experiment for many of our associations. Therefore, it seems to me that the establishment of a permanent conference on a state level consisting of representatives of these various groups would do much to promote the reforms in judicial administration which the American Bar Association so ardently seeks.

The Jenkins-Keogh Bill is also a case in point. Our mobilization of the major organizations of the country representing self-employed persons has proved the efficacy of co-operation. More than thirty such groups have rallied to our banner and are joining with us in our effort to obtain pension relief for the 10 million self-employed persons in this country. Certainly with such strong support, the attaining of our goal in the current Congress should prove much easier.

By way of reporting on the present status of our campaign, it is interesting to note that our pre-election poll indicated an overwhelming number of our Congressmen in favor of the plan which would permit the self-employed of the nation,

(Continued on page 117)

Views of Our Readers

■ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the Journal or otherwise, within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves to itself the right to select the communications which it will publish and to reject others. The Board is not responsible for matters stated or views expressed in any communication.

For Members Going to London

■ I will appreciate it if you will pass this letter on to whoever is concerned with procurement of accommodations for the 1957 London Meeting.

A client and friend of mine, opened her family home near Ivybridge, in South Devon, England, several years ago to what she refers to as "paying guests". She has recently written me asking whether I thought any members of the Association who might be attending the London Meeting would be interested in the accommodations which she has to offer.

She tells me that she would consider accepting a very limited number of paying guests who would appreciate a good British country house atmosphere for whom she would provide good food, drinks and service. The location, though several hours from London by train, would afford a very good base for members who might be interested in touring the West of England and should especially appeal to persons interested in horses, fox hunting and other rural pursuits.

It has occurred to me that there might be some members of the Association who were planning to visit England for a longer period, either before or after the London meeting, to whom some such arrangement might appeal.

I have written Mrs. Wilmot telling her that accommodations in England are being handled by American Express Company and Thos. Cook and Son and suggesting that she communicate directly with their respective London offices. If you think any useful purpose would be served by communicating with her directly she is: Mrs. Roderick Wilmot, Cleeve, Ivybridge, South Devon, England.

R. L. Slingluff
Baltimore, Maryland

Dialectical Materialism and American Foreign Aid

■ Mr. Lloyd Buchanan's interesting article, "Dialectical Materialism: We Have Embraced a Communist Tenet!" in the August issue of the Journal, mounts a perspective too often ignored by the individual citizen and his government alike in considering the problems of world community.

Mr. Buchanan's emphasis on the similar orientation of American policy, in the establishment of foreign economic and political programs, and of Communist policy, grounded on "dialectical materialism", is a point worthy of study. That Marxism, together with its further theoretical elaboration and implementation in the Soviet Union, is basically a Western phenomenon is well known. West European *and* American "materialism" as well as much of the official Russian view of the nature of the world and of man are of common root, history testifies. But to associate the Marxist doctrine of dialectical and historical materialism with the "materialism" of the Marshall Plan, UNRRA, Point Four and FOA is, surely, an infelicitous turn of semantics or an unfortunate reading of history, more especially the history of thought.

However, to identify economic measures taken to prevent the appearance or expansion of Communism as the same fire which rages towards us is no more than metaphor when the wider moral issues at stake are considered, issues of which Mr. Buchanan is well aware. (And I think the stratagem for sheer survival by such economic means is not to be denied.) For Communism is indisputably a gospel of bread, whatever else it may be. The rich man prating of spiritual values before the poor and the resentful of the world, bestowing bread conditionally and on "principle", will not reap the reward he expects his virtue to bring. He sleepwalks in his own disorder.

The crux of the problem is perennial, and Mr. Buchanan sees it clearly. How are the "dominant aspects of the free spirit" *to remain* ascendant and free in a civilization dedicated to power and material aggrandizement? How can material assistance alone remove the mote from the hungry eye?

And Mr. Buchanan's answer is almost right. But it is the "correct principle" of which he speaks, the moral imperative free of expediency—this, and more—which moves us to the gratuitous act which may remove the beam.

David D. Thomson
Chicago, Illinois

The Gong Lum *Case and Segregation*

■ Mr. Alfred J. Schweppe in his contribution to "Views of Our Readers" in the September issue of the Journal has, I submit, failed to distinguish the question considered in *Gong Lum* v. *Rice*, 275 U. S. 78 (1927), from the general question of whether the "separate but equal" doctrine of *Plessy* v. *Ferguson* 163 U. S. 537 (1896), is a denial of equal protection of the laws, as de-

(Continued on page 108)

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American Bar Association Journal

the official organ of the American Bar Association

The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the Bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect, so far as possible, the objectives of the organized Bar of the United States.

There are seventeen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Insurance Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral Law; Municipal Law; Patent, Trademark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who is a member in good standing of the Bar of any state or territory of the United States, or of any of the territorial groups, or of any federal, state or territorial court of record, is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement and nomination by a member of the Association in good standing. All nominations made pursuant to these provisions are reported to the Board of Governors for election. The Board of Governors may make such investigation concerning the qualifications of an applicant as it shall deem necessary. Four negative votes in the Board of Governors prevent an applicant's election.

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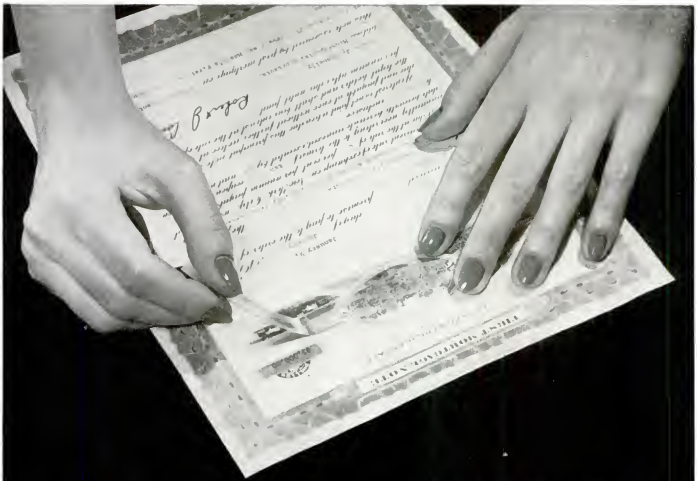

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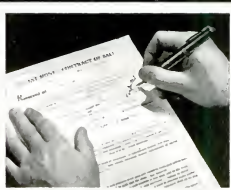

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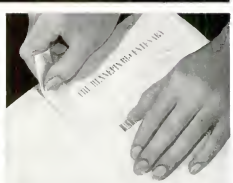

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cided in the affirmative in *Brown* v. *Board of Education*, 347 U. S. 483 (1954).

The question disposed of in Chief Justice Taft's opinion in the *Gong Lum* case was whether a Chinese citizen of the United States is denied equal protection of the laws when he is classed among the colored races and required to attend a segregated Negro public school rather than a segregated white public school. All of the quotations offered by Mr. Schweppe in his letter from the brief of the plaintiff in error in the *Gong Lum* case, as well as from Chief Justice Taft's opinion therein, clearly indicate that the only question therein raised and considered is that of a child of Chinese ancestry who is classified as a colored person.

Therefore, Chief Justice Warren's statement in the *Segregation* cases, 347 U. S. 483, 491, to the effect that the validity of the "separate but equal" doctrine had not been challenged in the *Gong Lum* case is correct. Apparently in the *Gong Lum* case, only the answering brief of the Attorney General of Mississippi referred to the possibility of the segregation policy being a violation of the U. S. Constitution. The doctrine itself, I repeat, was not challenged; the challenge was the application of the doctrine to a person of Chinese ancestry. Chief Justice Taft ruled only that such a person is not denied equal protection of the laws in being classified among the "brown, yellow or black races".

Perhaps this response to Mr. Schweppe is mere hair-splitting; but the fact remains that the Taft Court in 1927 chose to consider the *Gong Lum* challenge narrowly, and indeed the language of the brief of plaintiff in error admits of that construction. Doubtless, the two questions are morally one, and the 1927 Court *should have* reviewed the entire question. It preferred, however, to believe that the contention of plaintiff in error was merely an objection to the child of Chinese ancestry being classified with the Negroes, and not a challenge of the "separate but equal" doctrine itself. In general, it must be concluded that the 1954 decision was more forthright and less dependent upon fancied distinctions than the *Gong Lum* ruling.

RICHARD T. MARSHALL
El Paso, Texas

The Segregation Cases from a Scientific Point of View

■ A patent lawyer is familiar with changing scientific environments and the effect of changing environment on the interpretation of leading cases. To such a lawyer the recent discussions of "segregation" decisions, like *Brown* v. *Board of Education*, 347 U.S. 483, seem to lack philosophical perspective.

Hundreds of thousands of Negro and non-Caucasian men and women have now reached intellectual and cultural levels that put them on par with the men and women of any nation. It is said that more Negro children go on to college in America than do British children in England.

Should not the changed social and cultural environment of all levels of society in America require the revision of ancient segregation and parallel "leading cases" which are set up against *Brown* v. *Board of Education*?

EDWARD THOMAS
New York, New York

The Fourteenth Amendment Is Unconstitutional, He Says

■ The members of the American Bar Association, at the 1956 Annual Meeting in Dallas, were welcomed by Governor Shivers "to a state whose people believe in the Tenth Amendment".

At the same time, however, the Conference of Chief Justices of the forty-eight states, by resolution deplored the centralization of power in the Federal Government and opposed the pre-emption by federal courts of "authority intended by the Constitution to be wielded by the states".

(Continued on page 110)

(Continued from page 108)

Curiously enough, however, the attempted justification of the decision by the Supreme Court in the school segregation cases, in two recent articles in the JOURNAL, has been by a law professor at the University of Texas (George W. Stumberg, 42 A.B.A.J. 318), and by a former Assistant Attorney General of Texas (Fagan Dickson, 42 A.B.A.J. 732).

Neither article presents any adequate reply to the very excellent article by Eugene Cook, Attorney General of Georgia and William I. Potter, of the Missouri Bar ("The School Segregation Cases: Opposing the Opinion of the Supreme Court"), 42 A.B.A.J. 313).

The American Bar, having before it the challenge of the Chairman of the Judiciary Committee of the U. S. Senate, Senator James O. Eastland, that through the Court's decision in the segregation cases *"the entire basis of American jurisprudence was swept away"* (speech of Senator Eastland in the Senate, May 26, 1955) must have more convincing arguments presented to the contrary in the court of public opinion before which the decisions in the school cases and other recent decisions believed by so many lawyers to be in excess of the judicial power, will now be heard.

Congress acted promptly to meet the unconstitutional usurpation of power in the tidelands and natural gas cases. The President saw fit, however, to veto the Harris-Fulbright Gas Bill. Some seventy bills were introduced in the last Congress to correct such decisions as in the Anti-Sedition case (*Pennsylvania* v. *Nelson*, 350 U. S. 497), and the temper of Congress and the people is such that corrective methods may be expected, whether by legislation directly curbing the Court to prevent amending the Constitution by judicial fiat, rather than "interpreting" it; or insisting upon the appointment of qualified men with judicial experience to the high Court.

Recent decisions of the Court have been denounced by 101 members of Congress (Manifesto of May 17, 1956), and the doctrine of interposition has been invoked by the legislatures of Virginia, Georgia, South Carolina, Louisiana, Alabama, Mississippi and Texas. Unless the decisions are over-ruled, the only remedy is by constitutional amendment, to prevent further infractions of the Constitution by the Court.

Mr. Dickson's article is based on the fallacious premises that:

1. "World opinion" has become an instrument of national policy, of sufficient importance to over-ride constitutional provisions (Tenth Amendment, for example).

2. The Constitution "changes", as the present Chief Justice asserted in *Fortune* for November, 1955, without the necessity of new legislation, to meet changes in psychological and sociological theories.

3. The Fourteenth Amendment is of such importance as to justify abandonment of the powers reserved to the states under the Tenth Amendment.

4. The protests against the segregation decision are based in "emotional" rather than legal concepts.

All of these assumptions are incorrect.

The segregation decision violated Section 5 of the Fourteenth Amendment, providing that Congress "shall have power to enforce by appropriate legislation, the provisions of this article". Congress has asserted no such power. The constitutional background of the Fourteenth Amendment is certainly questionable, having been effectuated by rabid abolitionists at the point of the bayonet, *after the Fourteenth Amendment had been legally rejected by the states*. In resting the decision on the Fourteenth Amendment, the Court violated not only that article, but also the provisions of the Tenth Amendment.

The underlying error in the segregation decision is that the Constitution is "flexible" and will adapt itself to new conditions. With this theory many constitutional lawyers cannot agree, as new conditions must conform to the provisions of the Constitution. Had there been a strict construction or "interpretation" of the welfare clause in the Constitution, we could have avoided Roosevelt's welfare state, which plunged the nation so hopelessly into socialism. A correct "interpretation" of the provisions of the Constitution would not have set racial relations back for generations, which was the direct result of the devastating decision in the segregation cases.

The protests of leading constitutional lawyers are not on any emotional basis. Segregation is only a minor issue.

The issue is not a choice, as one commentator has said between the "fierce defense in the Deep South of the white way of life" and the "militant demand of the Negro for enforcement of the decree" in the segregation cases.

The predominant issue is whether any branch of the Federal Government, including the Supreme Court, is empowered to amend the Constitution by judicial fiat or decree; to act as a super-legislature, or to usurp the undelegated and reserved rights and powers of the states and the people, without conforming to the constitutional procedure prescribed for constitutional amendments.

The American Bar has been given a serious challenge. It must be met. What are we, as lawyers, going to do about it?

W. JEFFERSON DAVIS
Los Angeles, California

"Let's Have a Section of Family Law"

■ The article by Judge Paul W. Alexander on "A Section of Family Law" in the August issue of the JOURNAL was quite provocative.

Both as a general practioner for twenty-nine years and a member of the Toledo Board of Education for the past nine years I have encountered many of the problems he has posed.

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WAYNE E. SHAWAKER
Toledo, Ohio

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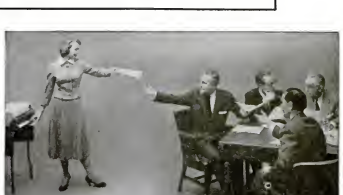

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Social Security:

Lawyers Under the Act of 1956

by Peter Miller • *of the New York Bar (New York City)*

■ **The passage by Congress of the 1956 amendments to the Social Security Act brought self-employed members of the legal profession under the system for the first time. In this article, Mr. Miller explains how the act operates and what lawyers who are now covered for the first time should do.**

■ Under the Social Security Amendments of 1956 as approved on August 1, 1956, self-employed lawyers receive old-age and survivor's insurance coverage effective January 1, 1956.[1] This coverage is not elective; it is mandatory. Before these amendments the Social Security Act covered lawyers only if they were employed by others or were engaged in a business in addition to, and apart from, the practice of law.

This article is intended to acquaint self-employed lawyers with their rights and duties under the new law.

1. *Obtaining an Account Number.* A lawyer who has never had an account number should apply for one by filing Form SS-5 with the local office of the Social Security Administration. He will normally receive an account number card within several weeks.

2. *Payment of Self-Employment Tax.* For the calendar year 1956, the Social Security tax is 3 per cent[2] of net income from self-employment up to $4,200,[3] or a tax of not more than $126. Effective on January 1, 1957, the tax rate will rise to 3⅝ per cent.[4]

The tax for 1956 will be computed in the regular Federal Individual Income Tax Return due April 15, 1957. A form entitled "Computation of Self-Employment Tax" appears on page 3 of Schedule C.

The computation starts with the taxpayer's net profit from his business or profession as determined on page 1 of Schedule C. This will include the professional earnings of a lawyer who practices by himself as well as the net income from any other business, *e.g.,* brokerage, conducted as a sole proprietorship.[5]

To proprietorship income is added the individual's distributive share of partnership profits[6] as shown in Schedule H of Form 1040 and Schedule K of Form 1065, the Partnership Return of Income. This includes any amounts treated as "guaranteed payments" for income tax purposes.[7]

If either proprietorship or partnership income includes rent from real property, dividends, interest, capital gains and losses and certain other items,[8] such items of income (and any deductions attributable to them) are to be eliminated. These eliminations are intended to limit Social Security coverage to earned income.

Frequently a lawyer will receive a salary as an employee or corporate officer in addition to income from his professional practice. On the first $4,200 of each such salary his employer is required to pay a Social Security tax of 4 per cent (4½ per cent beginning in January, 1957), half of which is recovered from the lawyer by withholding.[9] In such cases the amount of self-employment income subject to the 3 per cent tax is limited to the amount, if any, by which $4,200 exceeds his salary or salaries subject to the 4 per cent tax.[10] Thus no Self-Employment Tax is payable by a lawyer receiving at least $4,200 in salary.

Several years ago the Internal

1. Social Security Amendments of 1956 (hereinafter cited as 1956 Amendments) Sec. 201(f) amended Internal Revenue Code of 1954 (hereinafter cited as 1954 I.R.C.) §1402(c)(5) to eliminate the prior exclusion of "lawyer" in defining a "trade or business" giving rise to "self-employment income" subject to self-employment tax. A similar change was made by 1956 Amendments §104(d) in Social Security Act as Amended (hereinafter cited as S.S.A.) §211(e)(5) for benefit purposes.

2. 1954 I.R.C. §1401(1) before amendment by 1956 Amendments §202(a).

3. 1954 I.R.C. §1402(b)(1)(B).

4. 1954 I.R.C. §1401(1) as amended by 1956 Amendments §202(a).

5. 1954 I.R.C. §1402(a).

6. *Ibid.*

7. Instructions on back of separate Schedule C. "Guaranteed payments" are defined in 1954 I.R.C. §707(c).

8. 1954 I.R.C. §1402(a)(1)-(3).

9. 1954 I.R.C. §3101(1) and §3111 before and after amendment by 1956 Amendments §202(b) and (c). See also 1954 I.R.C. §3102(b).

10. 1954 I.R.C. §1402(b)(1)(B).

Revenue Service ruled that director's fees and executor's and trustee's commissions would not be treated as self-employment income if received by a lawyer as an incident to the practice of law.[11] At that time the practice of law was expressly excluded from the definition of self-employment.[12] Now that the practice of law is included as self-employment, it would seem that such fees and commissions should be included in net earnings from self-employment.

3. *Eligibility for Old-Age Benefits.* Old-age benefits are payable only to "fully insured" persons.[13] An individual becomes "fully insured" when:

(a) he has had forty quarters of Social Security coverage,[14] or

(b) he has had coverage during at least one-half of the calendar quarters between January 1, 1951, and his sixty-fifth birthday,[15] or

(c) he has had coverage during all but four of the calendar quarters beginning January 1, 1955, and ending on July 1, 1957, or, if later, his sixty-fifth birthday.[16] In no event can an individual become "fully insured" until he has had at least six quarters of coverage.

A self-employed individual is ordinarily deemed to have coverage in all four quarters of a calendar year in which his annual self-employment income was at least $400.[17] Otherwise it is immaterial whether quarters of coverage are acquired as an employee or as a self-employed person.

Example: Under (c) above, an attorney over age 65 with no coverage prior to January 1, 1956, will become "fully insured" on April 1, 1957, *i.e.*, with six calendar quarters, if at any time during each of the calendar years 1956 and 1957 he earns net income of $400 or more by his professional activities. The mere earning of $400 or more at any time during 1957 will give him four quarters of coverage for that year, or two quarters more than he needs. He is not required to have had any coverage during the four quarters in the calendar year 1955.

4. *Computation of Old-Age Benefits.* Under the so-called "1954 formula", the "primary insurance amount" (monthly old-age benefit payable to an individual over age 65) is 55 per cent of the first $110 of "average monthly wage", plus 20 per cent of the remainder up to $240.[18] Thus, an individual with an "average monthly wage" of $350 or more will receive the maximum monthly old-age benefit of $108.50 exclusive of any benefits payable to his wife.

The "average monthly wage" is generally computed by totaling all wages and self-employment income up to $4,200 a year between the "starting" and "closing" dates and then dividing by the number of months elapsing between these dates.[19] The starting date is usually December 31, 1950,[20] even if the individual first acquires Social Security coverage thereafter, *e.g.*, on January 1, 1956. The closing date is usually the first day of the first year in which the individual is both "fully insured" and attains age 65.[21] However, the numerous exceptions to these rules include a provision permitting the "dropping out" of up to five years of lowest earnings,[22] so that the years 1951-1955 need not be taken into account in computing the "average monthly wage" of an individual who did not have Social Security coverage during such years.

Example: An attorney attains age 65 on January 1, 1960, having earned net income of over $4,200 as a law partner during each of the nine calendar years 1951-1959. After "dropping out" both income and months for the 5 years, 1951-1955, he will have 4 x $4,200 or $16,800, as his total income covered by Social Security during the four years, 1956-1959. Dividing $16,800 by 48 months results in an average monthly wage of $350. Under the "1954 formula" this produces the maximum monthly benefit of $108.50.

It follows from these rules that a lawyer with no Social Security coverage prior to January 1, 1956, will receive the maximum retirement benefit only if he earns self-employment income of at least $4,200 in every year until he attains age 65. He cannot "drop out" his earnings for 1956 or any subsequent year because his "drop out" privilege is necessarily exhausted by the five years, 1951-1955.

Although a man over age 65 is potentially entitled to apply for old-age benefits, a person under age 72 loses one month's benefit for each month in which he is deemed to earn income of $80 (or any fraction thereof) in excess of $1,200.[23] The first $80 in excess of $1,200 is deemed to have been earned in December, the second $80 is deemed to have been earned in November, and so on. Thus, an attorney under age 72 may receive no retirement benefits for any year in which he earns more than $2,080, *i.e.*, $1,200 + (11 x $80). Even if he earns more than $2,080, however, he is entitled to a benefit for any month in which "he did not engage in self-employment and did not render services for wages . . . of more than $80".[24]

Retired individuals receiving benefits are required to file an annual report with the Social Security Administration showing earnings in excess of $1,200 for the preceding year.[25]

Example: The only income earned during the year by a retired attorney aged 70 consists of director's fees totaling $3,000. If he attends no meetings and performs no other "substantial" services during four months of the year, he is entitled to benefits for those four months.

A person over age 72 is entitled to old-age benefits (after he becomes "fully insured") regardless of the size of his current earnings.[26]

Benefits are exempt from federal income tax.[27]

5. *Computation of Wife's Benefits.* The wife of an individual re-

11. Special Ruling, dated August 19, 1952, Commerce Clearing House Standard Federal Tax Service for 1952, Volume 5, 16289.
12. 1954 I.R.C. §1402(c)(5) before amendment by 1956 Amendments §201(f).
13. S.S.A. §202(a)(1).
14. S.S.A. §214(a)(2)(B).
15. S.S.A. §214(a)(2)(A).
16. S.S.A. §214(a)(3).
17. S.S.A. §212(a) and 213(a)(2)(B).
18. S.S.A. §215(a)(1)(A).
19. S.S.A. §215(b)(1).
20. S.S.A. §215(b)(2).
21. S.S.A. §215(b)(3).
22. S.S.A. §215(b)(4).
23. S.S.A. §203(b)(1) and (e)(2).
24. S.S.A. §203(e)(2)(D).
25. S.S.A. §203(g)(1).
26. S.S.A. §203(e)(2)(C).
27. I.T. 3447, §1941-1 C.B. 191.

ceiving old-age benefits may receive monthly benefits of ½ of her husband's "primary insurance amount" (or up to $54.30 per month) if she is at least 62 years old, or if she is under 62, she has in her care an unmarried child entitled to Social Security benefits, *i.e.*, under 18 years or disabled.[28] However, if a woman between the ages of 62 and 65 elects to receive benefits prior to age 65, the amount of her benefits are permanently reduced by formula.[29] Moreover, she will lose one or more monthly benefits if either she or her husband earns more than $1,200 a year before age 72.[30]

6. *Survivor's Benefits.* Upon the death of a self-employed person benefits may be payable to his widow, children or parents, depending upon factors too numerous to be discussed here.

Briefly, if the decedent's average monthly earnings (after "dropping out" up to five years of low earnings) are equal to the $350 maximum, his unmarried dependent child under 18 is entitled to monthly benefits of $81.40, *i.e.*, ¾ of the father's "primary insurance amount" of $108.50.[31] If there is more than one such child, each qualifies for a monthly benefit equal to ½ of the father's "primary insurance amount" plus ¼ divided by the number of children. Thus, if the decedent leaves three such children, each could receive up to $63.30 monthly.

If the decedent's average monthly earnings are equal to the $350 maximum, his widow is also entitled to monthly benefits of $81.40 if she is over age 62, or if she is under age 62, she has in her care an unmarried child entitled to Social Security benefits.[32] However, she will lose one month's benefit for each $80 which she earns in excess of $1,200 per year prior to age 72.[33]

In no event may the combined monthly benefits payable to surviving dependents exceed $200.[34]

Survivor's benefits are exempt from federal estate tax.[35]

7. *Lump-Sum Death Benefits.* In addition to the foregoing survivor's benefits, a lump-sum payment equal to $255 or 3 times the decedent's "primary insurance amount", whichever is smaller, is payable to his widow or, if he leaves no widow, to the person who pays his burial expenses.[36]

8. *Applications.* Social Security benefits are payable only for the twelve months preceding the filing of a timely application therefor.[37]

The following is a brief summary of what we have said:

1. You must obtain a Social Security account number if you do not already have one.

2. You may be subject to a Self-Employment Tax of not more than $126 for 1956 payable with your Federal Income Tax Return for 1956.

3. You will not be eligible for old-age benefits until you have had sufficient Social Security coverage to become "fully insured".

4. You may ultimately become entitled to a monthly old-age benefit of as much as $108.50.

5. Your wife may ultimately become entitled to a monthly old-age benefit of as much as $54.30.

6. Your surviving child, if under 18, will receive a monthly survivor's benefit of as much as $81.40 in addition to a similar benefit to your widow if she takes care of such child or is over age 62.

28. S.S.A. §202(b)(1)(2).
29. S.S.A. §202(q).
30. S.S.A. §203(b), (c) and (e).
31. S.S.A. §202(d)(1),(2).
32. S.S.A. §202(e)(1),(2).
33. S.S.A. §203(b)(1), (e)(2).
34. S.S.A. §203(a).
35. E.T. 18, 1940-2 C.B. 285.
36. S.S.A. §202(i).
37. S.S.A. §202(j)(1).

Peter Miller practices in New York City. He is a member of the Committee on Corporation-Stockholder Relations of the Section of Taxation and the Committees on Taxation of both the New York State Bar Association and the New York County Lawyers Association. He is a graduate of Columbia and of the Yale Law School.

The President's Page

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including lawyers, to set aside 10 per cent of their income, or the sum of $5,000, whichever is the lesser, into an approved pension fund upon which federal income taxes would be deferred until the beneficiaries reached the age of retirement or sooner if it becomes necessary to take down their savings.

Such a plan, it seems to me, is very much in the public interest and is in accordance with the true American tradition of promoting private enterprise. It would serve to stimulate savings on a voluntary basis as distinguished from the compulsory nature of the social security law. The siphoning off of a part of the national income in this manner should also prove anti-inflationary. Furthermore, the extension of this privilege to the self-employed would afford such persons the same privilege now enjoyed by millions of employes of corporations having established pension and profit sharing plans.

With the support of such a large segment of our population, it is our fervent hope that Congress will realize in this session the justice of our cause. It would be helpful if state and local bar associations adopted up-to-date resolutions endorsing the Jenkins-Keogh Bill, which already has been introduced in the current Congress, and transmit such resolutions to their respective congressional representatives.

A Noble Profession:

A Retort to Our Critics Within the Bar

by J. Reese Daniel • *of the South Carolina Bar (Columbia)*

■ **For the last several years, lawyers have been talking about the problem of "specialization" of practice, and readers of the Journal will recall several articles on this subject that we have published. A proposal to set up a system of "colleges" to establish standards for recognition of "specialities" was considered and rejected by the Board of Governors only a short time ago. Many of the arguments in favor of recognizing "specialists" in the law have been based on the system of the medical profession. Mr. Daniel objects to this comparison of the two professions and argues that it is the doctors, not the lawyers, that have made the mistake in so far as "specializing" is concerned. In this outspoken article, he urges his fellow lawyers not to follow the lead of the medical profession.**

■ I, for one, am proud of my own profession, and I am weary of having it compared—by lawyers—with the medical profession, and always invidiously.

There is a great hue and cry among the legal profession to follow the lead of the physicians. The battle hymn of this group is "Let's All Do Like the Doctors Do".[1] It is impossible to tell whether there is really a large number of such malcontents or whether (as is probable) they are merely more vociferous than the rest. The present furor stems from the controversy over specialization, and the main argument advanced by the proponents is that the doctors do it that way. The real question is whether they want to specialize as lawyers or, as they appear to indicate, merely want to do anything the medical profession does. I venture to guess that if all the doctors in the nation were to start standing on their heads while treating patients, a certain percentage of lawyers would begin interviewing clients in this undignified position. It must indeed gratify the ego of the doctors to be pointed out as the paragons of professional practice.

Let's examine the reasons, both announced and unannounced, for all this worship at the medical shrine. Taking the announced reason first, the proponents of the "whither thou goest, I will go"[2] school say the public interest is the only consideration of this beneficent group. The syllogism can be stated thus: "Doctors provide better service than lawyers; doctors specialize; therefore if lawyers specialize they will provide better service." Practically everyone will agree with the minor premise, but most people will find the major premise unacceptable and the conclusion illogical. And yet, as recently as this summer, we hear it advanced again. Mr. De Chimay in a letter printed in the March, 1956, issue of the JOURNAL asks why we don't do as the doctors do. Mr. Appleman, in the July, 1956, issue of the JOURNAL answers that we are too selfish and states the major premise that doctors provide better service than lawyers through specialization.

In another context, Mr. Justice Holmes once said that "a page of history is worth a volume of logic".[3] Blackstone, Coke, Littleton and More were formulating great principles of law while surgeons and physicians were still barbers and bloodletters. Medicine as a science is in its infancy and may try to repudiate many methods before settling down. This is no reflection on the men who practice medicine today. The blame cannot be laid at their doorsteps for the stagnation of the sciences in a long void from Hippocrates to Pasteur, and the failure of medicine to advance apace with the humanities and the law. However, it cannot be gainsaid that medicine has a history of fitful starts and dead ends, of advances and retreats, and the practice of medicine today is not the medical practice of even one hundred years ago. The law, on the other hand, has a his-

1. To the tune of "Let's All Sing Like the Birdies Sing".
2. Book of Ruth 1:16.
3. *N. Y. Trust Co.* v. *Eisner*, 356 U.S. 345 (discussing property law.)

tory of an unbroken line of growth and development back into the dawn of British culture,[4] and to the extent that the Norman Conquest engrafted onto it the civil law, back to Justinian and Solon. Orderly development, unmarked by radical revolution, is the heritage of the legal profession. Doctors are now trying to find their way out of the confused labyrinth of new discoveries, novel methods and untried theories coming at them in bewildering array. Most lawyers know where we came from and, in general, where we are going. Professor Joiner, in the July, 1953, issue of the JOURNAL told us that "The Medical Profession Shows the Way". Nonsense, professor; they aren't holding aloft the guiding torch for us; they are seeking the light themselves.

Let's look at that major premise again, *doctors provide better service than lawyers*. Who passed this judgment? The doctors? The lawyers? Let's put the question to the greatest jury of all, the lay public. Take a sample poll among your friends and acquaintances. The results of my own little sampling surprised me. Many people today would give a lot to have their old G.P. back, and believe they someday may if the breed is not extinct when the medical profession discovers that it has gone too far. Their family doctor was a combination physician, father confessor and family counselor. Today's patients often feel like a piece of machinery on an assembly line, with one man to put the rivets in the head and another to tighten the screws in the elbow. The doctor frequently doesn't even know their names. And therein lies the crux of this matter: it is the public that is dissatisfied with the profession and not the profession itself. Among the lawyers it appears that the profession is dissatisfied and the public content. Mr. Siddall, in his retort to Professor Joiner in the July, 1956, issue of the JOURNAL, said we are "many years behind the doctors in our development of specialization. . . ." Perhaps it did not occur to Mr. Siddall that in not following blindly the lead of another profession we are ahead rather than behind.

The Public Confidence . . . *Who Says We've Lost It?*

But imagine (if you can) that the major premise is not an absurdity; does the conclusion necessarily follow? No lawyer needs to be told of the importance of public confidence for the successful practice of law. Editor-in-Chief Tappan Gregory of this JOURNAL takes firm issue with the belief held by some lawyers that the profession has lost the confidence of the public. He has quoted with approval[5] the remarks of Judge William L. Ransom: "The time has . . . come to stop defending the legal profession and apologizing for our Bar Associations."[6] Twenty-three of the thirty-three presidents of this nation practiced law, and in addition Theodore Roosevelt, Harding and Truman studied law although they never practiced it. In my own State of South Carolina the governor, lieutenant governor, president *pro tempore* of the state senate, the speaker of the state house of representatives, both United States Senators and half of the Congressmen are lawyers. Does that sound as if they have lost the confidence of the people?

It is an undeniable fact that laymen will tinker with their own wills, deeds and contracts more readily than they will attempt to give themselves penicillin, and a man in pain will put up with a lot more than one who is thinking clearly. Only so long as we maintain confidence, that long only shall we retain the clients. Send John Client to Lawyer Doe for a tax problem, and have him send poor old John along to Lawyer Roe to draw the necessary trust instrument, and pretty soon John will begin to feel that he has been sent after a left-handed monkey wrench. Who can blame him if he recites General McAuliffe's speech at Bastogne[7] and forgets the whole thing? Canon 35 of the American Bar Association's Canons of Ethics provides that "A lawyer's responsibilities and qualifications are individual. . . . A lawyer's relation to his client should be personal, and the responsibility should be direct to the client." To whom would the "specialist" be responsible? To the firm that refers the client to him? Whom will he have foremost in mind, the client or the referring firm to which he owes his existence? And even if fee-splitting is avoided (the temptation would be great), how would the lawyer avoid the appearance of it and keep the confidence of the client?

Legal problems, like medical problems, do not fall neatly into a narrow textbook category. They have an unfortunate habit of spilling over the lines. Picture a "trial specialist" who has depended on a "tort specialist" to give him the law. He delivers a magnificent oration

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4. Wilkins, *Leges Angliae Saxonicae*, 1721.
5. THE BARR, Phi Delta Phi quarterly, May, 1949.
6. At a regional meeting of bar association representatives and members of the Missouri Bar Association, Springfield, Missouri, September 28, 1955.
7. "Nuts!"

to the jury, masterfully cross-examines the witnesses and stares down opposing counsel, only to stumble and flounder over a pointed question from the bench on a motion for a directed verdict. Doctors sometimes bury their mistakes—lawyers' mistakes are made before a courtroom full of laymen and then immortalized in the public decisions of courts of last resort. The moral is that no lawyer can afford to be deficient in any field, and if he is, the books are always available.

This is not to say that there are no incompetent lawyers now, just as no one would say there are no incompetent doctors, and for all I know, incompetent Indian chiefs. But the point is that we should tailor our own solutions to fit our own problems, and not whine with the pessimistic Persian poet: "Ah Love! could you and I with Him conspire to grasp this sorry Scheme of Things Entire, Would not we shatter it to bits . . . ?"[8] For those who would build, the answer lies in the American Bar Association system of law school inspection to raise the standards of legal education, and the work of the Section of Legal Education and Admissions to the Bar to standardize and elevate requirements for admission to the Bar in the several states. If as much energy were applied to these endeavors as is wasted on trying to ape the medics, what problems there are would soon disappear.

From whence come these voices crying in the wilderness (Mr. Appleman's phrase, *op. cit.*)? As the editor reported in the July, 1956, issue of the JOURNAL, only four appeared before the Board of Governors in 1954, including the ubiquitous Professor Joiner. Those who might be called "specialists" appeared in droves to decry the medical plan of compartmentalized knowledge. They said they were general practitioners, whose practice perhaps emphasized one field more than another, and well they should be. The roof of the temple of justice is not supported by one pillar.

The Real Reason . . .
Doctors Make More Money

Let's make an honest appraisal of this dispute and lay aside the wonderful, highflown public reasons. Isn't the cold, hard, bedrock of this controversy the fact that doctors make more money than lawyers?

Comparative data of the Section of Bar Activities indicate that until 1940 the lawyers were ahead, with a gross average income of $6,747 and a net of $4,507, to $7,632 gross and $4,441 net for the doctors. By 1951, the positions were reversed, with lawyers averaging a gross of $14,171 and netting $8,730, while doctors grossed $22,298 and netted $13,432. According to the same data, dentists were and still are behind both other professions. Significantly, no lawyer has been heard to raise the cry: "Let's practice like the dentists do."

To state it syllogistically, that small, private and unannounced voice would be saying: "Doctors make more money than lawyers do; doctors are highly specialized; *ergo*, if lawyers specialize they can make more money." This is the "acres of diamonds", "grass is greener" thinking that probably engenders 99 per cent of the professional jealousy and the burning desire to emulate. It does seem sort of ridiculous to have to keep repeating that the diamonds were in the fellow's own back yard all the time, but few ever discover them.

Do doctors make more money than lawyers? John W. Branch, of the Rochester, New York, Bar, in a well-reasoned and soundly researched article denies it.[9] Mr. Branch's studies indicate that doctors may earn more on an annual basis, but law compares very favorably on a lifetime basis. He finds that lawyers reach their peak earnings between the twentieth and fortieth year of practice, a span of twenty years. Doctors, on the other hand, experience their peak between the eighth and twentieth years, a span of twelve years. The earnings of a doctor no longer able to carry a full work load decline, whereas the advice of the elderly practitioner of law is even more eagerly sought. It just takes the lawyer longer to get there, but Aesop's tortoise has been beating the hare for two thousand years now.

But suppose the lawyer can't wait—he is caught in an economic squeeze now and it is the annual income he is worried about, not the lifetime prospects. Is he doing anything about it, or is he, like Charles Wilson's infamous kennel dog, sitting down and yelling for his dinner? How many of the critics within the legal profession have led a movement in their local bar associations to inform the public of the necessity of having a will, having a title searched, and the magic words *et cetera*? Mr. Drinker says that's all right.[10] For $2 a year any lawyer can join the Section of Bar Activities. This Section is now conducting a study of the economics of the legal profession, emphasizing law office management, the results of which could well cut the gap between gross and net. This is a lot more likely to alleviate the situation than any ephemeral pot of gold at the end of some other profession's rainbow. How many of the "me too, doc" fringe belong to this important Section?

The machinery is available to do all that we need to do within our own profession. It is an ancient, honorable and respected profession; perhaps not perfect, but what human endeavor is? But let us iron out our imperfections in our own way, rather than bemoaning the low estate to which lawyers have fallen, and pointing the finger of scorn at our brethren because they don't imitate some alien group.

And let's stop comparing the legal profession with the medical profession. It sounds like a story attributed to Sir Norman Birkett, Judge of the Queen's Bench:

"I well remember a young legal friend of mine who went to a great

8. *The Rubaiyat of Omar Khayyam*. Fitzgerald's first translation. quatrain No. 72.

9. *Yes, I Want To Practice Law*, CASE AND COMMENT, May-June, 1956.

10. LEGAL ETHICS, Henry S. Drinker (Columbia Univ. Press, 1953) page 255.

gathering of the medical profession, trying to curry favor with them, which is a fault of some members of the legal profession, and said: 'I know not why I was invited here unless it be there is some affinity between your great profession and mine, because I know that whenever I finish a case I say to myself, "Now, have I left anything out?" whereas the medical profession at the end of a case, say, "Have I left anything in?" ' "

I submit that this pretty well sums up the "affinity".

Notes from the Temple:

Law Reform—Marriage and Divorce

by C. O. Herd · *of the Middle Temple (London)*

The following article is one of several short notes on recent developments of the law in the United Kingdom written by Mr. Herd for the Journal. In this issue, the note deals with a recent effort to permit divorce automatically after the spouses had been separated seven years.

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The Report of the Royal Commission on Marriage and Divorce (Command Papers No. 9678) was examined in the House of Lords on October 24, when Lord Silkin moved for papers. He recalled that this Commission followed a debate in the House of Commons on the second reading of a private member's bill introduced by Mrs. Irene White in March, 1951. This bill was a Matrimonial Causes Bill whose main object was to add another ground for divorce to the existing law, namely, that either spouse should be entitled to obtain a divorce if the parties had been separated for not less than seven years. The bill passed its second reading by 131 votes to 60.

In the normal course of events, this bill would have gone through the committee stage and then had a third reading. If it had succeeded in passing the third reading, it would have been placed before the House of Lords. This procedure was not followed because after the second reading the Government undertook to set up the Commission on Marriage and Divorce. One of the fundamental questions that the Commission had to consider was whether or not an irretrievable breakdown of marriage should be a ground for divorce, which was the substance of Mrs. White's bill based on the view that if the parties had been separate and apart for seven years or more, that should be, automatically, a ground for divorce.

In the events which happened, the Commission were equally divided on this question. Nine members took the view that there should be no change in the law. Nine supported the introduction of a new ground for divorce founded on the complete and irretrievable breakdown of the marriage. Of the latter nine, four took the further view that a divorce should be at the instance of either party, whether that party was guilty or not.

Lord Silkin, supporting his motion, was in favor of the additional ground for divorce, though he had to concede that it would be allowing the guilty party to take advantage of his own wrong.

As might be expected, the suggested new ground for divorce met with stiff opposition. The President of the Probate Divorce and Admiralty Division, Lord Merriman, contended that the introduction of the theory of the breakdown of marriage as a ground for divorce would greatly increase the tendency to divorce by consent, *i.e.*, where the agreement of the parties was the only basis on which divorce was sought.

It was the Bishop of Exeter, however, who revealed a very formidable obstacle facing the supporters of the new ground. His argument was that marriage is a lifelong union the obligations of which may only be removed by higher authority for good cause: and that once the doctrine of

divorce for matrimonial wrong is removed and there is substituted for it the theory of divorce by consent, the whole doctrine of marriage as it has been accepted in this country has inevitably changed. That is to say, that the parties to a marriage would be contracting a union which could be terminated by the will of either or both of them, and that the decree of divorce would be an act of notarial registration registering the decision already arrived at by one or both of the parties.

Such a union would not be a Christian marriage, but could be more accurately described as a contract of concubinage.

The Joint Parliamentary Under Secretary of State for the Home Department, Lord Mancroft, held out no present hope of legislation being introduced dealing with the new ground of seven years' separation. He thought that since the Commission were equally divided on this question, that would reflect a similar division of opinion throughout the country and in the House of Lords, and that few governments would be ready to legislate in such circumstances without first allowing time for public opinion to crystallize and for Parliament to express its views.

The same line was followed by the Lord Chancellor, Lord Kilmuir, who wound up the debate. He noted that the speeches in their own House had made it clear that the new ground was one on which people could with deep sincerity hold diametrically opposite views, and that it was not surprising that the Royal Commission broke even in its numbers on this point, and that in the circumstances no one could possibly expect a Government to announce legislation on the subject.

However, some reform in the law as regards proceedings relating to children might be brought about by amending the rules of court, and for this purpose the Lord Chancellor proposed to invite the Supreme Court Rules Committee to consider various amendments.

Lord Silkin's Motion, by leave was withdrawn.

The result of the Report of the Royal Commission and the debate in the House of Lords seems to be the convenient shelving of a very controversial matter raised by Mrs. White in her Matrimonial Causes Bill. No major change in the grounds for divorce is contemplated by the Government, and if any such change is sought, it will be necessary for another private member's bill to be introduced.

ASSOCIATION CALENDAR

ANNUAL MEETINGS

New York City and London	
New York City, Association	July 14 - 16, 1957
New York City, Sections	July 12 and 13, 1957
London	July 24 - 31, 1957
Los Angeles, California	August 25 - 29, 1958
Washington, D. C.	August 24 - 28, 1959

BOARD OF GOVERNORS MEETING

Denver, Colorado	May 10 - 12, 1957
Administration Committee	May 10, 1957
Board of Governors	May 11 and 12, 1957

MIDYEAR MEETING

Edgewater Beach Hotel, Chicago	February 13 - 19, 1957
Administration Committee	February 13, 1957
Board of Governors	February 14 and 15, 1957
Group Meetings	February 16 and 17, 1957
House of Delegates	February 18 and 19, 1957

REGIONAL MEETING

Denver, Colorado	May 9 - 11, 1957

Take and Give:

Free Enterprise and Altruism

by Walter Gordon Merritt · *of the New York Bar (New York City)*

■ **Mr. Merritt's article is an examination of what he finds to be two conflicting forces in our civilization: free enterprise, which is motivated by selfishness, and religion, which teaches unselfishness. Both forces, he says, are useful and necessary to us and have contributed to our well-being. We have achieved a practical compromise between them, he says, which results in neither individualism nor socialism, but which aims to achieve the beneficent objectives of each force.**

■ Life is so full of conflicts. We would all like to be free from fear and want but in the present state of human imperfection, such a fulfillment would undermine moral character. Security is sought and planned but sages, philosophers and writers of distinction have been telling us throughout many centuries that security is man's mortal enemy. I like deer, but we can have too many. We introduce one pest to hold another pest in check. In the ecology of life we have to maintain a balance—too many good things throw us out of gear—too few bad things can do the same.

Perhaps there is an ecology in moral forces. One concept of life is that of a battle between good and evil, between God and the Devil. So, conflict being the law in biology and religion, it should not come with surprise to recognize that, in the organization of civilized society, mankind is facing a most serious problem in applying the contradictory appeals of the Christian religion and our system of free enterprise—to both of which we are dedicated and by both of which we are benefited. It is the fundamental issue of egoism and altruism, the boundaries of which have long been debated, but never settled, by the philosophers.

Our free enterprise system is fueled by the incentive of selfishness. Its base is egoism. The major tenet of the Christian religion is unselfishness and sacrifice. Its base is altruism. One orders you to look after yourself and the other bids you look after your brother. Free enterprise bids the strong and talented man to make the most of his superior opportunities, but according to Christian faith when the Creator made strong men and weak men, he did not intend the strong should prey on the weak. The Christian concept applied to economics could well be summarized by words from a strange—but non-Christian—source, "From each according to his abilities. To each according to his needs."

But despite the conflict, these two motivating forces are shaping the progress of our country. Here is an outstanding example of co-existence without subjugation. As someone remarked, it is the conflict between the violin and the bow which makes music.

It is a fact that we cannot afford to forgo the dynamics of selfishness although we can make selfishness more enlightened, and it is that inexorable fact which has exploded many Christian dreams of socialism. It is an equally important fact that free enterprise, unmitigated by Christian idealism or social ideals, would carry us back to monopolies, starvation wages, child labor, oppressive hours and slums, and might bring us to some counterpart of feudalism. Either extreme is being avoided. Simultaneous dedication to selfishness and unselfishness on a compromise basis is taking us somewhere. Which motivation is gaining on the other? What seems to be the discernible point of reconcilement?

Lest I seem to over-accent the conflict, let me quote from scriptures and classics. It is written in the Book of Timothy: "The love of money is the root of all evil." The Gospel of Matthew tells us "It is easier for a camel to go through the eye of a needle than for a rich man to enter into the Kingdom of God." And the same Gospel says "Ye cannot serve God and Mammon." Poverty vows are still required as a necessary step for certain religious fulfillment.

Pope Pius XI put it extremely when he said: "All economic life has become tragically hard, inexorable and cruel."

In a lighter vein, Lowell wrote:

Not a deed would he do
Nor a word would he utter
Till he weighed its relations
To plain bread and butter.

In the operation of free enterprise the force of selfishness rears its head at most critical points. The seller seeks as much money as possible for as little as possible from the consumer. The slogan is "All the traffic can bear." With the aid of competition, the consumer seeks to get as much as possible from the producer for as little as possible. Of the middle man, Disraeli said: "He is a man who bamboozles one party and plunders the other." Labor organizes unions to make itself effective. The worker who forsakes the solidarity of labor in time of crisis is often threatened, beaten or ostracized. To his fellows he is a traitor and his sins may follow his children to school.

Conflicting Forces . . . *Advance Civilization*

In the early history of the Christian religion we denounced this commercialism more frankly than we do today. The religious teachers repeated the notion that money is the source of all evil, and that you cannot serve both God and Mammon. Today only a bold few—at least in cities—would risk losing support for their church by overemphasizing such texts and probably only a few extremists would deny that we must, as a practical matter, serve both God and Mammon, and that man as a social being has become a more sympathetic and brotherly person by such joint service. A strange phenomenon is it that two conflicting forces with opposite ideals should each make a contribution to a higher state of civilization which is nearer to the ideals of both Christianity and economics.

Early in this century, John D. Rockefeller, Jr., brought ridicule on his head when as leader of a Bible class he tried to prove that no such conflict existed. At that time President Faunce of Brown University wrote him: "If it is impossible to reconcile Christian brotherhood with relentless competition (as I think it is) the fault lies not with any one man but with our general social order in which we all share and for which we are all responsible."

It was, of course, this confusion of motives, this conflict between the ideal and the practical, which led some people in our day to follow the illusions of the Russian experiment. They felt that the competitive quest for gain, with varying capabilities for money making, and the cumulative inequalities in economic power which might follow, would inevitably bring grief to society, and that nothing short of a major operation would avert this.

Now let us listen to the proponents of the free enterprise system. They proclaim its virtues and are critical of efforts to impregnate it with brotherhood and egalitarianism. They scornfully speak of "creeping socialism". Some of the bolder ones call it "galloping socialism". They might well invoke the pen of Emerson, who wrote: "The greatest meliorator of the world is selfish huckstering trade." Franklin commented: "The dog that trots about finds a bone." It is contended that "Labor for labor's sake is against nature" and, therefore, we must lure the individual by individual rewards or pressure him by fears. David Hume wrote: "Avarice is the spur of industry."

Without piecework systems or task standards and the uncertainty of holding a job, without being haunted by fear of want, and without the competitive struggle for patronage, it is generally believed in industry that our society would not enjoy its high level of material benefits. So most people are led to the belief that the present system of economic rewards and punishments is breath to our economic life, just as the Christian religion, for a long time at least, predicated its advancement on "threats of Hell and hopes of Paradise". They evidently feel that the egalitarian ideal of socialism cannot be more than a creed for the guidance of voluntary individual conduct.

The same man goes to church on Sunday and dedicates himself to brotherhood and then goes to his office on Monday and dedicates himself to selfishness by his devotion to his particular enterprise. And I daresay that in most cases he has not paused long enough to recognize and admit this contradiction in his life. Probably the answer is that both attitudes help the upward climb of the human race, notwithstanding their conflict in motivation.

Out of this driving force of cupidity or egoism, involving competitive striving by individuals, or groups, for their own betterment, come great material benefits, unattainable in any other way—at least in this stage of human development. Luckily a by-product of this selfish push is social good. No unselfish system known to mankind can accomplish as much in civilizing our people. Just how far and how fast mankind can progress before it can dispense with such pressures is not an answerable question. Conservatives believe that, under a democratic rule where the majority controls, there is danger of going too far and fast in reducing the rewards or increasing the burdens of the strongest and most talented. There is a point beyond which you cannot impose altruism by law.

No realist can deny the over-all truth of this thesis by claiming that businessmen are primarily motivated by a desire to help society.

The incentive to work, save and invest is important even with those at the top of the economic ladder. In fact the conviction is widespread in the world of business management that even with top executives drawing large salaries, it is necessary to give stock options or incentive bonuses to induce them to give of their best. To destroy that incentive might well curtail the expansion of industry and job opportunities needed for an expanding population. Such at

least is the viewpoint of many thoughtful people.

Is this not an illustration of the clash of opposites, each creating the beneficial force of challenge and response, where the optimum outcome of wholesome conflict must be a practical compromise. "He that wrestles with us strengthens our nerves and sharpens our skill. Our antagonist is our helper," said Edmund Burke. So if we admit that unalloyed Christian idealism and unalloyed free enterprise are each impracticable in building a social structure for imperfect man and that each is a challenge to the deficiencies of the other, we may at least travel a road of practicable progress. If industry is not softened by some sense of brotherhood, it becomes callous. If it is too much softened, it becomes flabby. Unrestricted liberty destroys itself. By too much regulation we reach what Mills called "Liberticide" and forfeit the aspirations of self-help and self-direction. Liberty is constantly being redefined and it would seem must always walk a tight rope. Is not this like the reactions of tolerance and intolerance, each of which is beneficent when applied with proper measure and each of which is baneful when carried too far?

Moreover, given the welfare state which decides important matters for the individual, it is felt that man's moral being will become constricted and atrophied because he is no longer impelled—or even free—to meet so many challenges of life in accordance with his own decision.

Selfish Incentives . . . *But Noble Objectives*

When we consider the individual incentives of selfishness, however, we must not forget that they may embrace noble objectives which we count among the cherished possessions of our civilization—a strong devotion to family life; a deep-seated urge to improve our children's opportunities; and a consciousness that, for many of us at least, happiness, or a more tolerable lot for ourselves and our families, depends on the character of the community in which we live and our collective contribution to its improvement. Men must unite to achieve what they cannot achieve individually and that broadens the scope of self-interest.

The modern voluntary hospital is an example. We would not have the means to provide so fully for it were it not for the abundance produced by selfishness and we would not have the social spirit, colored in many ways by something approaching altruism, if we did not have faith in functioning through society to meet common social needs. So travelling from the selfishness of the individual to group action for community needs, we go a long way toward bridging the chasm between egoism and altruism. And so it is in some degree with schools, private and public, libraries, churches and universities; and to a growing extent with corporations and labor unions. While the last two struggle to the utmost to come up with a rosy balance sheet or higher wages, they are more and more ready to promote social, medical and educational advancement for large groups. The group seems to envision broader horizons. But even this can have queer wrinkles. I well remember arguing a case before the United States Supreme Court where one local brotherhood was boycotting the products of other local brotherhoods of the same national union and the Chief Justice asked "Is that where the brotherhood comes in?"

Another outstanding development, ameliorating or avoiding some of the ills of the free enterprise system, is the diversity of statutes and governmental controls designed to curb the evils of cupidity. In recent years these have rapidly multiplied. Usury laws and bankruptcy laws come first to mind. They or their equivalent are of ancient origin. Graduated income taxes and death taxes lean toward egalitarianism. The antitrust laws forbidding certain collaboration and relying on competition to protect the consumer are but a mandate to compete and not to co-operate to exploit the public. Various enactments ban discrimination and excessive charges by transportation and power and light companies because they hold key positions in our national economy.

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Child labor laws and minimum wage laws, recognizing that man's cupidity may force anti-social conditions of employment, seek to prevent hitting below the belt while engaged in the struggle for economic survival. Laws protecting the right of workers to organize illustrate how society is prepared to arm the underprivileged against possible oppression from the strong. We aim for a balance in bargaining power.

Such steps taken by legislation and otherwise to establish more humane standards in industry accent the evils of economic selfishness which they are designed to assuage and serve to illustrate the manner in which our growing recognition of religious and ethical standards expresses itself where otherwise uncurbed avarice would operate to bring repression and distress. As long as human nature is what it is, economic agencies in strategic positions, whether they be public utilities, railroads or large industrial and

financial corporations, are regulated —and this includes some unions—to prevent them from taking unfair advantage of some of their special opportunities to overreach. It is a compromise between free enterprise and social and Christian ideals, not to be sneered at as creeping socialism, if it stops at bounds of practical economics. We are a practical people. Franklin spoke in terms of practicality and not ideology when he said: "Honesty is the best policy."

The report of a Committee of the Chamber of Commerce of the United States, released early in 1956, does not agree with the larger contours of this portrayal. It describes more euphemistically the force which motivates the American businessman in his relations to the rest of mankind. This force, says the report, "is not an economic force at all but a moral one—an acute awareness of an obligation to his fellow man as strong and unyielding as our belief in the maker of man".

To the extent that the statement in the report is true, it is indeed encouraging, but one has ground for being skeptical of such an all-embracing conclusion. Whatever be the fact today, history does not sustain it, even in the recent past. In matters involving social progress in labor relations, businessmen as a whole did not lead or even voluntarily embrace. The most outstanding improvements were imposed by the pressures of politics and economics and not because management had a growing awareness of an obligation to a fellow man. The same is true of legislation in many other fields affecting business. Perhaps the report from the U.S. Chamber is based on the philosophy that the actual practice of uninvited—if not welcome—reforms, in time creates an improved moral climate.

Outstanding is the sincere conviction of businessmen,—rising in many cases above the ordinary impulses of self-preservation, that—whatever be the ideals of fellowship as preached in the gospels—it is the honest duty of business to resist an overdose of this kind of medicine and perpetuate the social blessings brought by healthy economic contest. What may be regarded by some as narrow selfishness in business, with many business leaders at least, is a profound conviction that we must not go too far or too fast in socializing our economy and that in the interest of social welfare the citadel of free enterprise must be defended. Well may they retort to their critics as did Burgess in *Candida*, "One don't take all a clergyman says seriously or the world wouldn't go on."

Arnold Toynbee says that when a man divorces his daily work from his religion, the results are "invariably calamitous". One may also comment that an attempt to interject too much religious altruism into our economic relations would be equally calamitous.

Public Opinion . . . *A Third Great Force*

The resultant of these two dominating but conflicting forces is public opinion, a third great motivating force, which is potent in shaping the conduct of mankind. Pylades once declared "I dread the scorn of men." "A dismal universal hiss, the sound of public scorn", as Milton describes it. The judgments of our fellow men, including those who have the power to legislate against us, collectively reflect the temporal and spiritual aims of society and are a more determining factor than we realize. Some of us like Pylades desire to avoid the scorn of men, while others, and particularly owners of property, fear attacks on their rights of possession. "No property is secure", declared Burke, "when it becomes large enough to tempt the cupidity of indigent people." Madison wrote that the unequal distribution of wealth is the greatest producer of factions and Toynbee says that class is one of the greatest enemies of any civilization. Consciously or unconsciously, many property owners are influenced by fear of these various possibilities.

It is public opinion, as pointed out by Adolf Berle, that restrains corporations. In a democracy where public opinion controls political policies, if these concentrated centers of power and property overreach or fail positively to promote social good, they will not be allowed freedom from more extended restrictive regulation.

The power of the giant corporation exists by the tolerance of the people. That tolerance is always revocable. The growing realization of this fact is one of the outstanding trends of our time. It is *laissez faire* at its best. The soulless corporation for practical reasons is acquiring a soul. Here is another point of reconcilement between Christian religion and the free enterprise system. In the corporate field the sovereign voice of the consumer controls economics, while the voice of public opinion or a wholesome respect for what the electorate may do, to a large extent determines social and humane standards. More and more the heads of large corporations, recognizing this situation, are acting with restraint and engaging in social good. The farseeing businessman is asking for the opportunity to demonstrate his capacity for social service.

"What is needed", writes Abe Raskin in the *New York Times* "is a thoroughgoing acceptance by all the power forces in our economy of the idea that the benefits of rising productivity must be equitably shared among consumers, workers and employees, not monopolized by those who command the greatest strength."

That certainly is practical Christianity if only it were possible to find a yardstick by which to apply it. In a highly competitive system, the benefits of rising productivity should eventually flow to everybody as a consumer. At any rate public opinion is shaping in this direction.

At the risk of appearing to simplify a subject which cannot be simplified, it may be suggested that in America at least we are guided by the spirit of "take and give". The free enterprise system with its driving competition enlists the indis-

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Comparative Negligence:

Let Us Hearken to the Call of Progress

by David G. Bress • *of the District of Columbia Bar*

■ **Mr. Bress is of the opinion that the doctrine of contributory negligence, a rule laid down by Lord Ellenborough in the year Abraham Lincoln was born, has long outlived its usefulness, if indeed it ever was useful. He points out that the United States is virtually the only country in the world where this doctrine is still in force, having long since been abolished in Great Britain, the country of its origin. The article is taken from a speech delivered before the Judicial Conference of the District of Columbia Circuit last summer.**

■ In 1949, the United States Court of Appeals for the District of Columbia Circuit in *Knell* v. *Feltman*, 85 U.S. App. D. C. 22, decided that in the District of Columbia contribution between negligent joint tort-feasors is just and proper. Speaking through Judge Miller, the court declared that those legally responsible for a negligent injury should be permitted to distribute their loss between themselves. As an *amicus curiae* appointed by the court in that case, I urged the adoption of that principle. The rule that I espouse today is basically the other side of the same coin. For today, just as in *Knell* v. *Feltman*, we are concerned with the problem of achieving an equitable distribution of loss arising from torts.

The problem today is centered about the rule of contributory negligence, ensconced in our law since *Butterfield* v. *Forrester*, 11 East 60, was decided in 1809. Because of its long life, this hoary rule should not dim the searching light of critical analysis. The old common law rule which rejected contribution between joint tort-feasors was born ten years before the common law rule of contributory negligence (*Merryweather* v. *Nixan*, 8 Term Rep. 186 (1799)). Because almost ten years have elapsed since the decision in *Knell* v. *Feltman* overturned the no-contribution rule, the rule of contributory negligence has had precisely the same longevity as the common law no-contribution rule. Therefore, having shown equal respect to our heritage of these two common law rules, it is now most appropriate to re-examine the contributory negligence rule.

Not only has the doctrine of contributory negligence caused much unrest, it has also suffered persistent and withering attack on all fronts.

As late as 1953, the Supreme Court in *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, deprecated its "harshness" and stigmatized it as a "discredited doctrine which automatically destroys all claims of injured persons who have contributed to their injuries in any degree however slight".

A jurisprudence, such as ours, which basically premises tort recovery on the concept of fault, should properly consider the fault contributed by him who seeks recovery. But it is not proper, nor even logical, to reason from this that the contributory negligence of the one injured should completely destroy his right of recovery. There *are other* alternatives. These alternatives have been lumped in rather indiscriminate fashion under the title of "comparative negligence". As I use it today, the term means a system of dividing damages based on a comparison of faults involved in causing injury. Recovery is *diminished* but not barred. Thus, if the plaintiff suffers $10,000 in injuries and his fault was 25 per cent of the total negligence involved, he will recover only $7,500 rather than nothing under the contributory negligence rule.

Damage Apportionment . . . *No Novel, Untested Theory*

It is important to observe at this juncture that I am not speaking of a novel, untested theory, or a theory which exists only in blueprint form and which has not been through the practical mill of everyday application. While the United States is practically the last citadel in the world of the harsh contributory negligence rule, comparative negligence is far more widely accepted in the

United States than is generally recognized. Approximately forty statutes, enacted by both the Federal Government and more than twenty-five states, call for the apportionment of damages in certain cases. It was estimated in 1953 that there were about 1,200 reported cases in the United States applying these statutes with apparent success. Arkansas, Mississippi, Wisconsin, Georgia, Nebraska, South Dakota and Tennessee adhere to comparative negligence generally–the Tennessee courts having espoused it as a matter of common law. Among these states, there are differences in respect to the applicability of the doctrine. Apportionment of damages in Arkansas and Mississippi will lie even though the plaintiff is the more negligent party; while Wisconsin and Georgia apply apportionment only when the plaintiff's negligence is *less* than the defendant's. Nebraska and South Dakota apportion damages only where the plaintiff's negligence is "slight" in comparison with defendant's "gross" negligence, and Tennessee confines apportionment to cases in which the plaintiff's negligence is only a "remote" cause of the injury.

American admiralty law, from an early date, rejected the unyielding rigors of contributory negligence. In cases of collision incurred through mutual fault, damages are divided equally between the vessels, a standard akin to that involved in contribution cases and which, notwithstanding its crudeness, is a closer approximation of justice in most cases than the arbitrary rejection of all recovery. In maritime torts, other than collision cases and where special statutes invoking absolute liability apply, admiralty reduces the injured party's recovery in proportion to his estimated fault.

In the United States, the energizing force in favor of comparative negligence has been the Federal Employer's Liability Act of 1908, although Florida and Georgia, pursuant to statutes enacted before the turn of the century, apportioned damages in cases involving injuries inflicted by railroads. The federal act applies to all negligence actions, in federal or state courts, where railroad workers are injured while engaged in interstate commerce. It provides in admirably succinct language that:

> The fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. . . .

These provisions were later incorporated by reference into the Jones Act and the Merchant Marine Act, involving injuries to maritime employees.

Historically, the summons for relief against the harshness of the common law rule of contributory negligence was intense, and sixteen jurisdictions followed the Federal Government by enacting employer liability acts on the state level, Wisconsin, Michigan and Arkansas providing that the plaintiff's negligence must not exceed the defendant's. The tide continued to mount, and ten states legislated apportionment of damages in respect to certain hazardous employments, five statutes qualifying the principle to cases where the plaintiff's negligence was "slight" in comparison to defendant's "gross" misconduct. The voice of Congress was again raised and apportionment in 1920 was extended to all deaths on the high seas. Further spreading beyond the labor field was the legislation in three states providing for comparative negligence in all cases of injuries inflicted by railroads, while in Virginia apportionment has been applied to accidents at crossings arising from the railroad's failure to give the required signals.

This hasty catalogue of *sanctioned* instances where the doctrine of comparative negligence comes into play does not exhaust its actual uses, however. Every judge and trial lawyer is aware of its *sub rosa* use by juries. It is constantly being smuggled into cases by juries who instinctively rebel against the Procrustean severities of contributory negligence. Such surreptitious evasions of announced principle are harmful to law and bring it into disfavor in the eyes of the community. The courts have taken an *official* part in this constant whittling away at the common law. The doctrine of last clear chance is an illustration of this, and is often thought to be a transitory doctrine in the direction of comparative negligence. But by invoking the last clear chance doctrine, which mitigates against the harshness of the contributory negligence rule, the whole loss is unjustly caused to fall solely on the defendant.

The United States . . . *A Last Stronghold*

England, which first brought the doctrine of contributory negligence into the judicial world, dispatched it in 1945 by comparative negligence legislation. Virtually the entire British Empire, including Canada, has closed ranks in this respect. Nor is the European continent, with its civil law tradition, shackled by the harsh doctrine we know so well. Comparative negligence prevails in Asia, in Asia Minor and even in the Soviet Union. In short, as I have stated before, we in the United States are virtually the last stronghold of the embattled doctrine of contributory negligence.

What is there to say in favor of the doctrine of contributory negligence? We should expect a doctrine which operates with such an iron hand to have an equally strong justification. Lord Ellenborough, a notorious conservative even for his day, did not even pause to justify its existence when he first propounded it in *Butterfield* v. *Forrester*. Others, however, have attempted to fill this breach.

We are told that the doctrine is correct because the plaintiff's contributory negligence is the sole proximate cause of his injury. If the plaintiff's negligence is the sole proximate cause, there is, of course, no need to refer to the doctrine of contributory negligence. The doctrine would only serve to confuse.

But it is apparent, by every test of proximate cause known, that the argument is erroneous. If two automobiles collide because neither driver is maintaining a lookout, and a passenger of one is injured, the negligence of one driver is not held to be the sole proximate cause. Except in states where a guest statute is operative, both are liable to the passenger, since their acts of negligence were proximate causes of the injury. Since this is so, there can be no reason for a different conclusion in respect to causation when one driver sues the other.

But this is not all. The rule is justified, we are told, because it aims to discourage accidents by refusing relief to those who fail to use proper care for their own safety. The trouble with this theory is that it is *only* theory. There is not the slightest indication from any jurisdiction which has adopted comparative negligence that an increase of accidents has resulted. The very same argument was advanced in order to defeat contribution between joint tort-feasors in *George's Radio* v. *Capital Transit Co.,* 75 U.S. App. D. C. 187 (1942). The Court rejected the argument, saying:

> To believe that the rule of no contribution will tend to make careless persons careful, or that a motorist who is not deterred from carelessness by fear of personal danger will be affected in his conduct by a legal rule . . . [denying recovery], seems to us wholly fanciful.

In addition, it may be said, with equal or no lesser cogency, that the doctrine of contributory negligence promotes accidents by assuring the negligent defendant that his victim's pleas for relief will be denied.

If one accepts the thesis that the outcome of litigation will deter negligence, then the rule of *comparative* negligence would *better* promote accident prevention by making the defendant financially responsible for his wrong, and, at the same time, diminishing the plaintiff's recovery in proportion to his fault. All parties will then feel the bite and incentive to safety will be fostered. Therefore, I say to those who advance this argument in favor of contributory negligence, that, although your aim is praiseworthy, you are defending the wrong doctrine.

We also hear that the law will not aid one who is at fault, and the shibboleth is invoked, borrowed from the chancellor, that the party seeking relief must come into court with clean hands. Many things may be said of this intonation in cases of personal injury. Designed as a tool for effectuating justice, it must first be established that invoking the clean hands doctrine to deny recovery in a law action is just. I have yet to hear the doctrine of contributory negligence defended on the ground of fairness. The law of the District of Columbia does not deny a negligent defendant relief when he seeks contribution from his co-defendant. Yet his hands are equally besmirched; the law is obviously lending its aid to one who has been found to be at fault. This argument, therefore, must also fail.

I submit, therefore, that the harshness of contributory negligence is completely without sound moral, logical or social justification. A doctrine which leaves the entire loss, which is caused by the fault of two parties, on one of them, is patently inadequate. The negligent defendant is exonerated, and the injured plaintiff, who may be the least able to bear the loss and whose fault may be less than the defendant's, is made to shoulder the entire loss.

However, before we can entomb the faded corpse, we must ask what we are to get in its place. The doctrine of comparative negligence must also bear scrutiny. You already know that there are several systems for apportionment of damages. It is beyond the scope of this short article to analytically compare their virtues and shortcomings. Much has been written about this; plausible and sometimes cogent arguments have been advanced in favor of one over the other. For example, it is felt by some advocates of apportionment that a plaintiff more negligent than a defendant should not be permitted to recover; that were the rule otherwise, the courts might be inundated by litigation. Therefore, it is argued that the Wisconsin plan of limiting apportionment to cases where the plaintiff's fault is less than the defendant's is superior to the systems of England, Arkansas and Mississippi, which permit unlimited apportionment.

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But my task is merely to demonstrate that the general practice of apportioning damages is superior to what we do now. And which of the various formulae for apportionment is most desirable can be left for discussion on some later occasion.

What has been said against comparative negligence and the apportionment of damages has been virtually confined to its administrative practicability, not its theoretical fairness. We may brush aside the argument that comparative negligence will cause exorbitant increases in insurance rates; for experience under legislation abrogating the doctrine of contributory negligence has demonstrated that this is *not* so. Insurance companies have not withdrawn from the field. In fact it is widely accepted that, with compar-

ative negligence, there has ensued a decrease in the over-all size of verdicts.

The Remaining Arguments . . . *Variations of the Same Theme*

The remaining arguments are but variations on a basic theme. The opponents of the doctrine have used the jury system as the convenient wedge for their main argument. They say: Juries cannot compare faults, and any apportionment based on a comparison of faults is nothing but a wild guess. We commonly hear this argument from insurance companies who have traditionally been hostile to comparative negligence.

In answer to this, we say *that* argument is without merit. Preliminarily, it should be noted that in no case has apportionment legislation ever been repealed. No jurisdiction which has taken the step toward apportionment has ever retreated to the arbitrary workings of the contributory negligence rule. Moreover, when an argument like this is advanced, it is well to inquire into the sincerity which motivates it. While insurance companies have raised a furious hue and cry against apportionment by asserting that degrees of fault are immeasurable, we find these very same critics enthusiastically sponsoring guest statutes in automobile litigation. And so, in Virginia, for example, the injured guest may not recover from his host-driver unless the latter was guilty of *gross* negligence. Thus, the sponsors of this legislation have argued, when it suited them, that there *are* degrees of negligence and that this matter may be vouchsafed to juries for determination. While it is true that such statutes do not involve comparison between the fault of plaintiff and defendant, it is nonetheless true that distinctions between degrees of fault are manifestly recognized in appraising the defendant's conduct. Having admitted this much, it must also be confessed that a comparison of plaintiff's conduct would only involve the application of like principles.

Similarly, juries have not been found inadequate to cope with problems of the highest degree of care—and, since *Hecht Co. v. Jacobson,* with problems of reasonable care under the particular circumstances of the case. And it is difficult to understand why the proposed rule for apportionment imposes more of a strain on the faculties of juries than the apportionment of damages which they are authorized to make in wrongful death cases between the spouse and next of kin.

We daily entrust to juries the task of financially estimating the humiliation involved in a broken nose, of estimating the worth of pain and suffering, spoiled reputation in defamation cases—the instances could be multiplied indefinitely. Why can they not also *apportion damages based on fault?* The answer is that they can, and that they have been doing so, with demonstrated success, for more than forty-five years under the Federal Employer's Liability Act. Of course, I do not say that the results have been perfect. But the critics who argue that apportionments will not be correct —that they can only be estimates—go *too* far. While such estimates may well be inaccurate, they are clearly more consonant with substantial justice than a capricious conclusion that, if the plaintiff is marked with any fault, 100 per cent of the fault must rest with him.

It is unlike our system of law to reject a *reasonably* just rule because perfection is unattainable. The law achieves its end when it approximates justice and accuracy as best it can. Our opponents in effect create a pseudo-dichotomy by their argument. They give the law only two alternatives: to effect absolute justice, or do nothing at all. We would do better to make occasional mistakes in the application of the rule of apportionment than to visit upon a less culpable plaintiff, as happens in some cases, the entire burden of loss. Our jury system, which in civil litigation functions mostly in tort cases, must stand condemned if it has inherent inadequacies which prevent us from administering fundamental justice. We should not concede—especially by default—that our juries are less capable than those in England which have been apportioning damages.

It may be that we will want to provide, as has been done in some of the Canadian provinces, that liability shall be apportioned equally when, under the circumstances, it is not possible to establish different degrees of fault. But, whatever the refinements, some apportionment rule should and can be found which will prevent the injustice of the contributory negligence rule. Anticipated excesses on the part of juries can be curbed by trial and appellate courts. It has also been suggested that the special verdict procedure be combined with apportionment so that it may be known that juries have in fact apportioned damages within rational limits. Such suggestions will warrant consideration. It is enough for our purposes to know that there are means for controlling apportionment and keeping it within fair bounds. Complexities are bound to arise. This is particularly so in cases involving multiple parties with cross-claims. They are far from insurmountable, however; and, as Dean Prosser has said, their occurrence has been astonishingly rare.

In addition to the substantive reasons for adopting the rule of comparative negligence, I should also mention a procedural benefit which will follow its adoption. We all know how congested our courts are; and we know that the greatest delay is in the jury calendar where personal injury claims primarily bulk. The prevailing rule of contributory negligence encourages the plaintiff, in cases where there is any suggestion of contributory negligence, to demand a jury trial since judges are more apt to apply the rule the way it is written. I, therefore, agree with Judge Peck, Presiding Judge of the Supreme Court of New York, Appellate Division, First

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Federal Pre-emption:

How To Protect the States' Jurisdiction

by Benjamin Wham • *of the Illinois Bar (Chicago)* and
Maurice H. Merrill • *Professor of Law at the University of Oklahoma*

■ **A system of government like ours which deliberately divides power between a central government and the various local governments has many advantages and presents one obvious problem: What happens when there is disagreement as to which government should prevail? The question, of course, is ultimately settled by the courts, sometimes to the dissatisfaction of a substantial number of citizens. This problem, which has come to be known as the question of federal "pre-emption", is the subject of this article. Mr. Wham and Professor Merrill discuss various aspects of the subject and suggest one method of handling the problem.**

■ Recent decisions of the United States Supreme Court nullifying state laws by the doctrine of federal pre-emption have aroused much discussion. Many charge that they involve judicial legislation by reading into statutes congressional intent to occupy whole fields to the exclusion of state and local governments.

One of the immediate causes for the bitter debate now raging is the decision in the *Steve Nelson* case. In that case the Supreme Court of Pennsylvania reversed the conviction for sedition against the United States, of Steve Nelson, a reputed Communist leader, because it considered the federal legislation to have pre-empted this field.[1] The United States Supreme Court sustained the Pennsylvania Supreme Court.[2] In summation of its position the majority of the United States Supreme Court said that "the conclusion is inescapable that Congress intended to occupy the field of sedition", and that "therefore a state sedition law is superseded, regardless of whether it purports to supplement the Federal law."[3] Critics of the decision have charged that this is judicial legislation because nowhere in the Federal Anti-Communist Act is there specific expression of intention to nullify state laws in that field. On the contrary, it is pointed out, in the Federal Criminal Code of which this Anti-Communist Law, the so-called Smith Act, is a part, this appears: "Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof."[4] In fairness, however, it should be remembered that the majority opinion does take note of this provision, only to reach the conclusion that it does not relate to the problem of pre-emption of legislative authority[5] and that this conclusion does seem to have substantial support in the context of the section.[6]

Another decision arousing controversy is the 1954 *Phillips* case.[7] Surprisingly, in it the Supreme Court appears to have gone contrary to expressly indicated congressional intention to preserve state jurisdiction over the local production and sale of natural gas. Congress had enacted the Natural Gas Act in 1938 giving the Federal Power Commission authority to regulate the interstate transportation and sale of natural gas. Local production and distribution of natural gas were exempted from the Act. Nevertheless the Federal Power Commission encroached, with the approval of the Supreme Court,[8] upon the reserved state jurisdiction. This caused Congress to enact the Kerr Bill in 1950 which reaffirmed the congressional intention to keep fed-

1. *Nelson* v. *Pennsylvania*, 377 Pa. 68, 104 A. 2d 133 (1954).

2. *Pennsylvania* v. *Nelson*, 350 U.S. 497, 76 S. Ct. 477, 10 L. ed. 415 (1956).

3. See *Pennsylvania* v. *Nelson*, *supra*, 350 U.S. at 504, 76 S. Ct. at 481, 100 L. ed. at 420.

4. 18 U.S.C.A. §3231.

5. See footnote to opinion in *Pennsylvania* v. *Nelson*, *supra*, 350 U.S. at 501, 76 S. Ct. at 480, 100 L. ed. at 419.

6. The complete section reads:
"The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.
"Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof." The majority opinion makes the point that the second sentence is effectual simply to limit the jurisdictional grant of the first sentence. The dissenting opinion takes a broader view of its effect, citing *Sexton* v. *California*, 189 U. S. 319, 23 S. Ct. 546, 47 L. ed. 833 (1903). The point is debatable, at least.

7. *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 74 S. Ct. 794, 98 L. ed. 1035 (1954).

8. *Interstate Natural Gas Co.* v. *Federal Power Com.*, 331 U.S. 682, 67 S. Ct. 1482, 91 L. ed. 1742 (1946).

eral control out of local gas production and local gas sales. However, President Truman vetoed this bill.

After the *Phillips* decision Congress enacted a new law establishing local control over independent production of natural gas. Unfortunately, there were charges of pressure and other questionable activities in the passage of the act. President Eisenhower, in vetoing the act, severely criticized the "arrogant" and "highly questionable" activities of certain proponents. Some advocates of the preservation of state and local jurisdiction have criticized the veto message for its failure to censure or condemn the Supreme Court for its alleged "judicial legislation" and its gratuitous extension of the federal power at the expense of states' rights which brought the Harris-Fullbright Bill to the floor of Congress in the first place.

These, and other recent decisions of the Supreme Court, have touched off a general debate over the proper sphere of the states and the nation[9]. Proponents of the states' rights position point out that certain powers were delegated to the Federal Government, and that at the time of the adoption of the Constitution and Bill of Rights it was intended that the states and the people retain all powers not delegated to the Federal Government. They point to the mandate of the Tenth Amendment that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The authors of this article agree with the viewpoint that where possible it is better to leave local matters to local jurisdictions, and that there is a large field in which it would be beneficial to permit concurrent jurisdiction. At the same time, we recognize that there are times when the federal power must be paramount. Our purpose is to discuss this situation dispassionately and to suggest a method for the protection of the jurisdiction of state and local governments in the numerous situations in which policy dictates this objective.

Apportionment of Power . . . *An Inescapable Problem*

We start with the truism that the problem of the apportionment of legislative power is inescapable in setting up the constitution of a federally organized government. The very basis of the choice for such a government over one established on a unitary basis is a recognition that, in the interest of both efficiency and liberty, some things should be left to local rule and other things should be done by a general authority.[10] For the Constitutional Convention of 1787, and, through the product of its labors, for our polity, the tone was set by the phrasing of part of Edmund Randolph's Sixth Resolution, presented to the Convention May 29, 1787, "that the National Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of these United States may be interrupted by the exercise of individual Legislation; to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union . . .".[11] Note that the essentials of Randolph's proposal have been carried out through the grants of legislative power to Congress, and through the supremacy clause, but with the addition of the judicial branch as a participant in the process through its function in interpreting the Constitution and in determining the extent of supersession of state legislation by congressional enactment.

The approach to the problem of distributing legislative power in a federal state may be made in many ways. In Australia, for instance, the central and the local governments seem to have a concurrent jurisdiction, but with supremacy accorded to the enactments of the central legislature.[12] In other polities, the central supremacy is preserved, as Randolph suggested for us, through the grant of a veto power to the central government over local legislation.[13] There may be vested enumerated powers in the local organs, with residual authority in the central government.[14] There may be the opposite device of vesting delegated powers in the central legislature leaving the residual authority to the local assemblies.[15] Finally, there may be a mixture of categories of central, local and concurrent jurisdiction, but with supremacy of the central authority in all matters of concurrent jurisdiction. This may arise from specific provision, as in India,[16] or by a process of judicial interpretation, as has been the case with our own Government.[17]

We say advisedly that our Constitution comprises these mixed categories, with full realization that the frame of the Constitution and the Tenth Amendment lend themselves to the familiar federal-delegation, state-residuum statement. Nevertheless, the course of decision through

9. We may mention *Slochower* v. Board of *Higher Education*, 350 U.S. 551, 76 S. Ct. 637, 100 L. ed. 449 (1956), holding invalid as a violation of due process of law, a New York statute making an invocation of the privilege against self-incrimination by a city officer or employee in refusing to testify before any official body, state or federal, "equivalent to a resignation", and *Railway Employes' Department* v. *Hanson*, 351 U.S. 225, 76 S. Ct. 714, 100 L. ed. 633 (1956), avoiding the "right-to-work" provisions of the Nebraska Constitution and statutes in application to employees of an interstate railroad because of conflict with provisions of the Taft-Hartley Act [45 U.S.C.A. §2 (11)], expressly allowing union shop contracts between bargaining agents of such employees and the employing railroads on specified conditions. Such decisions do not affect our particular problem, but they do form part of the background for the currently raging debate. The discussion over the proper scope of the treaty power is another facet of the same conflict. It must be said that not all participants will agree as to the position that should be taken as to specific aspects of the general problem.

10. See Pound, *Law and Federal Government*, in Pound, McIlwain and Nichols, Federalism as a Democratic Process (1942).

11. See Tansill, (Ed.) Documents Illustrative of the Formation of the Union of the American States, 117.

12. See Australia Const. (1900) §§51, 52, 107-109.

13. This seems the result of the Constitutions of the Union of South Africa (1910), and of Czechoslovakia (1948), as to Slovakian powers of self-government.

14. See Union of Burma, Const. (1947), §92.

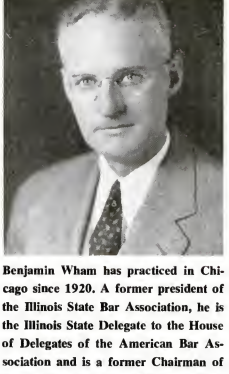
15. This is the form, at least, of the Argentine Constitution of 1949, but it is to be noted that the grants of authority to the national government are very extensive.

16. See Douglas, We the Judges (1955), *passim*.

17. See Grant, *The Concept of Concurrent Power*, 34 Col. L. Rev. 995 (1934), 3 Sel. Essays on Const. Law, 784.

the years[18] has brought us to the concurrent power position in many matters and, historically, there is weighty authority for its correctness.[19] Indeed, whatever the scheme of federalism, and no matter how vehemently the concept of concurrent power may be negated,[20] it is almost impossible, in practice, to avoid the possibility that central and local authority may be employed to achieve substantially the same ends. Especially is this true under such a constitution as ours, which apportions powers rather than spheres of influence or action.[21]

The fact of concurrent action, and the fact of federal supremacy, if Congress desires, in case of such action: these, then, are a legitimate part of our constitutional law. The areas of action to which they may extend are legion. We enumerate a few. There are the twin doctrines of state power to regulate interstate and foreign commerce in matters *prima facie* adapted to diversity of treatment,[22] and of state authority to achieve the legitimate objects of their local policy by regulations incidentally and moderately affecting interstate or foreign commerce.[23] There is the ability of the states to draft local regulations in aid of federal policy,[24] provided Congress has not evinced a desire to "go it alone",[25] There are the problems arising out of the federal authority, by the "necessary and proper" and the supremacy clauses of the Constitution, to supersede state rules governing matters ordinarily of local cognizance if Congress deems them to affect adversely a legitimate exercise of federal jurisdiction.[26] Despite the constitutional cession of liquor control to the states, effectuated by the Twenty-First Amendment, their actions in that regard may run afoul of the exercise of federal power based on other constitutional grants.[27] We could continue the enumeration indefinitely. Obviously, the occasions in which there may be a claim of clash between state and federal statutes must arise frequently, and the courts cannot evade coming to judgment thereon.



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If Congress always would be specific, as it was with respect to the application of state right-to-work laws to railway labor collective bargaining contracts,[28] the Court's task would be simple. But Congress rarely is so outspoken. The judges usually are saddled with the task of determining whether and to what extent there is conflict between state regulation and congressional mandate[29] or congressionally authorized administrative order.[30] Even if there is no explicit contradiction, there is frequent occasion to deal with the contention that Congress has so completely covered the subject as to manifest an intention to occupy the entire field,[31] in which case its silence upon the particular matter is equivalent to a declaration that it shall not be subject to state control.[32] Variously phrased principles of decision have been evolved as guides to Bench and Bar in dealing with these contentions. There is a presumption that Congress does not intend to exclude state action if it does not say so expressly or if there is no necessary conflict between the national and the state enactments.[33] In deciding whether this

18. For a good survey of doctrinal evolution in the Supreme Court of the United States, see Kallenbach, FEDERAL COOPERATION WITH THE STATES, Chapter II (1942).

19. See HAMILTON, in THE FEDERALIST PAPERS, No. 32.

20. "The provinces shall not exercise any power delegated to the Nation." Argentine Const. (1949), Art. 101.

21. Cf. Collier, *Judicial Bootstraps and the General Welfare Clause*, 4 GEO. WASH. L. REV. 211, (1936), 3 SEL. ESSAYS ON CONST. LAW, 603, 606-607.

22. *Cooley* v. *Board of Wardens*, 12 How. (U.S.) 299, 13 L. ed. 996 (1851).

23. *Wilson* v. *Blackbird Creek Marsh Co.*, 2 Pet. (U.S.) 245, 7 L. ed. 412 (1829).

24. *California* v. *Zook*, 336 U. S. 725, 69 S. Ct. 841, 93 L. ed. 1005 (1949).

25. This is the theory of *Pennsylvania* v. *Nelson*, *supra*.

26. *Houston, E. & W.T. R. Co.* v. *U.S.*, 234 U. S. 342, 34 S. Ct. 83, 582 ed. 1941 (1914); *Missouri* v. *Holland*, 252 U. S. 416, 40 S. Ct. 382, 64 L. ed. 641, 11 A.L.R. 984 (1920).

27. *U.S.* v. *Frankfort Distilleries*, 324 U. S. 293, 65 S. Ct. 661, 89 L. ed. 951 (1945).

28. "Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State," Congress authorized union shop contracts under specified conditions. 45 U.S.C.A., §152 (11).

29. *Amalgamated Association* v. *Wisconsin Employment Relations Board*, 340 U. S. 383, 71 S. Ct. 359, 95 L. ed. 364 (1951).

30. *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U. S. 767, 67 S. Ct. 1026, 91 L. ed. 1234.

31. *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148, 62 S. Ct. 491, 86 L. ed. 754 (1942).

32. See Bikle, *The Silence of Congress*, 41 HARV. L. REV. 200 (1927), 3 SEL. ESSAYS ON CONST. LAW 911.

33. *Maurer* v *Hamilton*, 309 U. S. 598, 60 S. Ct. 726, 84 L. Ed. 969, 135 A.L.R. 1347 (1940).

presumption is overcome, significant factors include whether the federal regulatory scheme is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it";[34] whether the national enactments "touch a field in which the federal interest is so dominant" as to compel assumption that the federal system is meant "to preclude enforcement of state laws on the same subject";[35] whether "enforcement of state . . . acts presents a serious danger of conflict with the administration of the federal program";[36] whether "the state policy may produce a result inconsistent with the objective of the federal statute".[37] The paucity of the exercise of federal administrative jurisdiction under a statute of wide potential application has been significant in a finding of congressional intent not to exclude state action in areas untouched by administrative directive.[38]

Congressional Intent . . . *Often Not Clear*

But when all the principles, all the standards and all the rules of thumb or of forefinger have been enunciated and applied, the judges really have been afforded little effective aid. They still have to indulge in what is at best intelligent guesswork, which may turn out to have been wrongly exercised.[39] Mr. Justice Frankfurter recently expressed well the difficulties of the judicial task:

> The problem is the recurring difficulty of determining when a federal enactment bars the exercise of what otherwise would clearly be within the scope of a State's lawmaking power. There is, of course, no difficulty when Congress explicitly displaces state power. The perplexity arises in a situation like the present, where such displacement by the controlling federal power is attributed to implications or radiations of a federal statute.
>
> The various aspects in which this problem comes before the Court are seldom easy of solution. Decisions ultimately depend on judgment in balancing overriding considerations making for the requirement of an exclusive nation-wide regime in a particular field of legal control and respect for the allowable area within which the forty-eight States may enforce their diverse notions of policy. The Court has heretofore adverted to the uncertainties in the accommodation of these interests of the Nation and the States in regard to industrial relations affecting interstate commerce—uncertainties inevitable in the present state of federal legislation.
>
> Proper accommodation is dependent on an empiric process, on case-to-case determinations. Abstract propositions and unquestioned generalities do not furnish answers.[40]

Is there anything that can be done to improve congressional expression in these matters and to lighten and to make more efficient the work of the Court? If such a result is possible, we certainly should be alert to achieve it, for present conditions, involving severe criticism of and dissatisfaction with the course of decision, cannot be regarded as satisfactory.

The Smith Bill . . . *Good, but Inadequate*

One suggested solution is presented by the so-called Smith Bill,[41] the operative part of which reads as follows:

> That no future Act of Congress shall be construed as indicating an intent on the part of Congress to occupy the field in which such Act operates, to the exclusion of any State laws on the same subject matter, unless such Act contains an express provision to that effect. Even with such express provision no future Act of Congress shall be construed as invalidating a provision of State Law which would be valid in the absence of such Act unless there is involved a power expressly granted to the Federal Government by the Constitution of the United States. No prior Act of Congress shall be construed to supersede State laws by implication unless there is a direct and positive conflict between an express provision of such Federal Act and such provision of the State law so that the two cannot be reconciled or consistently stand together.

We applaud the general objectives of this proposal, which has the indorsement of the American Bar Association,[42] but we question whether it will be truly effective, and, also, we are not convinced that it gets to grips with the real problem.

Our doubts as to the Smith proposal's effectiveness arise from several sources. There exist in the storehouses of the law many doctrines and precedents which lawyers whose clients' interests might require decisions contrary to the commands of the Smith proposals could, and unquestionably would, cite to the Supreme Court. There is no guarantee that their arguments, thus buttressed by authority, would not prevail with the Court. At most, the proposal could have no effect on the construction of statutes as applied to transactions occurring prior to its enactment. The Supreme Court, in accordance with general American authority, is clearly of the opinion that declaratory acts cannot be applied to the construction of statutes in litigation concerning matters occurring before the enactment of the declaratory legislation.[43] In view of this, we should expect the last sentence in the extract above quoted to be of no effect as to transactions occurring prior to its adoption.

Even as to future transactions, this provision is likely to have little

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34. See *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230, 67 S. Ct. 1146, 1152, 91 L. ed. 1447, 1459 (1947).

35. See *Rice* v. *Santa Fe Elevator Corp.*, *supra*, 331 U. S. at 230, 67 S. Ct. at 1152, 91 L. ed. at 1459.

36. See *Pennsylvania* v. *Nelson*, 350 U. S. 497, 505, 76 S. Ct. 477, 482, 100 L. ed. 415, 421 (1956).

37. See *Rice* v. *Santa Fe Elevator Corp.*, *supra*, 331 U. S. at 230, 76 S. Ct. at 1152, 91 L. ed. at 1459.

38. *Atlantic Coast Line R. Co.* v. *Georgia*, 234 U. S. 280, 34 S. Ct. 829, 58 L. ed. 1312 (1914).

39. Thus the decision in *Oregon-Washington Ry. & Nav. Co.* v. *Washington*, 270 U. S. 87, 46 S. Ct. 279, 70 L. ed. 482 (1926) was overruled by amendatory statute within six weeks of its rendition. 44 Stat. 250. And the current press informs us that many congressmen, avowing that the decision in *Pennsylvania* v. *Nelson*, *supra*, misreads the legislative intent, are lending support to bills designed to correct the alleged error.

40. Frankfurter, J., dissenting, in *United Mine Workers of America* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62, 76, 76 S. Ct. 559, 567, 100 L. ed. 514, 532 (1956).

41. H. R. 3, 84th Congress, First Session.

42. See 41 A.B.A.J. 1075 (1955).

43. *Ogden* v. *Blackledge*, 2 Cr. (U. S.) 272, 2 L. ed. 276 (1804); *Town of Koshkonong* v. *Burton*, 104 U.S. 668, 26 L. ed. 886 (1881). "The legislature may pass a declaratory act, which, though inoperative on the pas., may act in future." Marshall, C. J., in *Postmaster General* v. *Early*, 12 Wheat. (U. S.) 136, 148, 6 L. ed. 577, 582 (1827). See also Holmes, J., in *U.S.* v. *Stafoff*, 260 U. S. 477, 480, 43 S.Ct. 197, 199, 67 L. ed. 358, 360 (1923).

Explosion Damage Cases:

Insurance Procedure and Expert Witnesses

by Stratton O. Hammon • *of Louisville, Kentucky*

■ **The author of this article is a seismologist, an architect and an explosives engineer, writing on the problem of the expert witness in his field. Few lawyers and judges pretend to know anything about high explosives, and their ignorance is probably shared by most juries. As a result, the outcome of litigation in which explosion damage is an issue may well depend upon the expert witness. Mr. Hammon discusses the problem of obtaining experts in this field and offers some practical advice to lawyers with an explosion damage case.**

■ It is quite possible that more confusion and uncertainty exists in the handling of blast damage cases than in any other type of litigation. Often these actions have developed a community aspect which has made it especially difficult to handle them due to the archaic beliefs of the claimants, the juries and even some attorneys and technical men. The rules of evidence have acted in a measure to prevent a marshaling of exact scientific knowledge to refute deep-seated popular misconceptions and fear of explosives to the extent that a defending attorney must exert his utmost diligence and his finest legal craftsmanship in order to insure that justice is done.

The scarcity of such cases until recent years is a contributing factor to this situation. Many times actions of this character are brought on for trial in courts which never before had heard a blast damage case. However, the increase in the density of the population added to an increase of 321,948,506 pounds in the yearly consumption of commercial explosives in this country between 1922 and 1951 have been reflected in ever increasing numbers upon the court dockets of the various states.

Recently the head of the recovery department of one section of only one adjusting and inspection company pointed out a stack of blast damage claims three feet high which he was about to distribute to legal firms within his territory for subrogation. In one small midwestern town 241 claims were made after clearing operations in which dynamite was used. Fifty suits have already been filed and the total damage claimed could reach a million dollars.

The great insurance industry is the most concerned in this matter for it is almost always involved on both sides of the claims. The extended coverage section of a fire insurance policy usually contains a clause insuring the policyholder against damage from external explosions. On the other hand the casualty companies insure the contractors, quarry owners or other users of explosives against losses incurred in the normal operation of their businesses.

There is a subtle difference between the basic attitudes and loss control procedure of the fire and extended coverage carriers, and that of the casualty carriers, even when these two types of insurance are available from the same company. The casualty carrier's basic obligation is to the operator against whom the damage claims are filed and they will generally defend vigorously, especially when it is considered that the claims have no basis in fact. Most often they must defend against a subrogation suit from a fire and extended coverage carrier, less often against a direct suit, and occasionally against a joint suit of the claimant and his extended coverage carrier in those cases where the policyholder believes he has been damaged beyond the coverage of his own insurance policy.

In operational procedure the casualty carrier has a distinct advantage should he decide to require his policyholder to conduct his affairs with eventual litigation in mind. He is centralized and under one control while the claimants may be scattered and represented by a score or more of competing and rival insurance companies. The nature of his operation allows him to have

seismologists, explosive engineers and architects present and recording data during the actual detonations. This information can be withheld until the time of the trial, or until brought out during depositions. In some cases pre-surveys are made of the buildings on all sides of the blasting area.

The extended coverage carriers usually have no knowledge of a blasting operation. More often than not, the blasting has been completed and the contractor moved away before the claims have been processed to the insurance level where some action can be taken to gather legal evidence. Even if some unusually alert adjuster did send out explosive specialists while the actual blasting was still in progress it would be difficult, but not impossible, to secure the data needed without the co-operation of the contractor. A case in point happened in a small town in the northern part of the country. A contractor, blasting for a sewer, had a seismological-engineering firm on hand with its instruments recording at the very first explosion. A structural engineer and a contractor inspected the houses of anyone complaining of damage. The work was completed and the contractor left town.

About this time some forty claimants, receiving no relief from the contractor or his casualty carrier, began to call upon their extended coverage carriers. A test case was suggested and fortunately a copy of the report of the contractor's seismologist-engineer was secured which changed the entire picture since it contained all the information which had been lacking. These additional claims could then be paid on probable damage in a definite number of buildings and successful subrogation was likely, with the evidence at hand.

The Insurance Carriers . . . *Conscious of Their Obligations*

The fire and extended coverage carriers have an obligation to their policyholders of which they are praiseworthily conscious. They sometimes instruct their adjusters to try to find legitimate means to pay the policyholder's claim. With this company policy of leaning over backward to do the right thing, and faced with a totally unfamiliar explosive-seismological-architectural problem hundreds of adjusters pay the claims and then leave it up to the recovery departments to subrogate.

It is at this point that the matter is usually handed to an attorney. He is most fortunate when he receives a casualty case with the evidence carefully organized by a specialist at the moment of its occurrence. He is least fortunate when he receives an extended coverage case with the vital evidence not only unorganized but almost unobtainable. There are a number of combinations possible between these two extremes, for instance a casualty case without a specialist on hand versus an extended coverage case augmented by a specialist.

There are some competent blast damage witnesses available in this country and these vary considerably in their qualifications. The ideal is to have one man who can qualify as an authority on the explosive technique employed in the actual detonation and then accurately describe and trace the vibrations which are transmitted through the earth or the air from this spot to the building in which damage is claimed. From this point he must know the characteristics of the vibrations through the structure to the particular points of damage and finally give concise accurate descriptions as to why these vibrations did or did not cause the damage alleged. Ordinarily it requires three professional men to muster such qualifications, an explosive engineer, a seismologist and an architect, but this becomes cumbersome in courtroom maneuver and most attorneys usually make out with one exp ' and hope for the best. Some spe. ilists can qualify on both explosives and seismology but the added qualification of architecture is as rare as it is necessary. An attorney who enjoyed a nationwide reputation for his success in insurance litigation once said, "Granting that everything else in a blast damage trial is equal; the law, the facts, and the ability of the lawyers, the negative testimony of a seismologist that explosion vibrations *did not* cause damage contributes 20 per cent towards winning a case, the positive testimony of an architect as to what *did* cause the damage is worth 30 per cent, the remaining 50 per cent depends entirely upon the legal sixth-sense of the expert witness." The legal sixth-sense to which he referred is to a large extent the ability to present evidence in a manner that is admissible. What does it benefit an attorney if he has an expert witness with the most complete command of his subject if he cannot voice it in a way that is acceptable to the court or understandable to the jury?

We should include, along with commercial explosive cases, those resulting from natural gas and gasoline explosions as well as claims arising out of jet and industrial vibrations. The admissibility of certain evidence is of far more importance in this than in the usual type of cases because of the general lack of knowledge of the effects of vibrations upon structures. This lack exists not only in the average jury, but includes people of education and enlightenment. Because of this, it is unusually difficult to make an effective case, since to accomplish this one must first instruct the fact-finding body in the rudiments of several interlacing sciences in order that they may, in even the most vague way, grasp a little of what they have been called upon to understand in order to render a proper verdict.

This task of creating understanding of an unknown subject is even greater than it seems, for it is not only necessary to instruct the fact-finding body so that the facts can be recognized as such but this must be so precisely done that the fantastic old wives' tales which fill the

mind of the majority in regard to explosives are eliminated at the same time. In other words the evidence must be so authoritative, detailed, exact and voluminous that it will literally smother the opposition. It is important to recognize that here the truth is not credible to the ordinary jury or even to the ordinary court because in a very minor way, the situation resembles that which confronted Galileo when it became apparent that many of his newly discovered natural laws of the solar system were at variance with certain passages in the Scriptures. Here again a handful of men are making extraordinary advances by applying mathematical analysis to physical problems and here again the fact-finding body is reluctant to give up its old erroneous beliefs.

Assuming that you are faced with the preparation of such a case under such conditions, what is to be done about it? First the authoritative, detailed, exact and voluminous evidence must be organized and its introduction planned in so careful a manner that it will be judged to be admissible. Secondly a great deal of time must be taken at the trial. Each little item must be thoroughly hammered home no matter how tedious it becomes to the court and jury.

Registered Engineers . . . *Not Expert on All Subjects*

First consideration should be given to the competence of the expert, or pseudo-expert, witnesses of the adversary. In spite of the continual cry that this country is in desperate need of engineers, the registration lists of most states are loaded with thousands of this profession. Both courts and juries seem to have the erroneous idea that any engineer is competent to testify upon anything technical and many engineers have done little to disabuse them of the idea. I have heard graduate registered engineers testify directly contrary to known laws of nature without the least hindrance of the court. These are easier to deal with, however, than admittedly well qualified and widely known authorities who testify, usually in an *ex cathedra* manner, on subjects and professions beyond their qualifications and knowledge.

One jurist has stated that incompetency means, if the term were properly used, that a *person* is unqualified to testify because of lack of understanding. (There are of course other grounds of incompetency under common law which have no bearing on the matter under discussion). The determination of whether a pseudo-expert witness has sufficient knowledge of the matter in question or had sufficient opportunity for observation so as to be qualified to give his opinion or conclusions is largely within the discretion of the trial court, and almost generally not reviewable upon appeal. A civil engineer, for instance, testifying upon alleged vibration or concussion damage to structures is clearly incompetent unless he has made a special study of explosive engineering, seismology and architecture and used their formulas and equipment to analyze the case in point. Since this would require years of time and thousands of dollars it is hardly possible to accomplish for an individual case.

"When a witness is offered as an expert upon a matter in issue, his competency, with respect to special skill or experience, is to be determined by the court as a question preliminary to the admission of his testimony. There should be a finding by the court, in the absence of an admission or waiver by the adverse party, that the witness is qualified; and since there is no presumption that a witness is competent to give an opinion, it is incumbent upon the party offering the witness to show that the latter possesses the necessary learning, knowledge, skill, or practical experience to enable him to give opinion testimony. The opposing counsel have the right to cross-examine the witness as to his competency" (*e.g.*, 20 Am. Jur., *Evidence* #786—no effort will be made to give full citations).

It is very necessary to success that an attorney object strenuously to an incompetent witness or to incompetent testimony of an otherwise competent witness. "The fact that evidence which is introduced in a case may be, if objected to, incompetent evidence under some one or more exclusionary rules of evidence does not destroy its probative effect, if it is admitted without objection. It is the generally prevailing rule that relevant evidence, where admitted without objection, has the force and effect of proper evidence and is to be accorded its natural probative effect as though it were admissible under the established rules of practice" (*e.g.*, 20 Am. Jur., *Evidence*, #1185).

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Frequently incompetent witnesses will give testimony which is contrary to scientific principles and natural laws. "Ordinarily the effect of scientific principles and natural laws in reference to evidence is considered in determining weight and sufficiency of the evidence in a particular case to support a verdict. It appears, however, that such principles and laws have some bearing in determining the admissibility of evidence. There is authority for the rule that a court may properly re-

fuse to admit evidence which is contrary to scientific principals or in conflict with natural laws and may properly withdraw such testimony from consideration by the jury if it has been admitted" (*e.g.*, 20 AM. JUR., *Evidence* #256.1).

Counsel should make full use of scientific books for the purpose of contradicting the witness on cross-examination. (*Wilcox* v. *International Harvester Co.*, 278 Ill. 465. 116 N.E. 151; *Gallagher* v. *Market Street Ry.*, 67 Cal. 13, 6 Pac. 869). This is devastating to the witness who is passing himself off as an expert but who has no real knowledge of the specialty about which he is testifying.

It is the habit of some expert witnesses in blast damage cases to testify in court from field notes prepared by an employee. The fact that the witness has not personally observed the alleged damage nor has conducted the field tests can be developed with some effect. The best witness is the real specialist who has been involved in the matter from its beginning and can testify not only from close personal observation but also from an intimate knowledge of all the variations of this particular case from its inception and can impart this feeling of proximity to the jury.

In the majority of cases in the past the authoritative expert blast damage witnesses have been highly qualified seismologists and explosive engineers whose forte encompassed the origin of the detonation and the vibrations emanating from it, through the earth or the air, to the structure in question. Up to the point where the vibrations entered the structure they were competent, but when they attempted to go beyond, into the realm of architecture and structural engineering and evaluate the effects of these vibrations upon structures, objection was effectively made to their testimony on the grounds of incompetency.

An Expert in Trouble . . . *A Pertinent Example*

The following questions and answers are pertinent excerpts taken from Docket No. 1511 of the Supreme Court of New Jersey in the case of *Stanley Company of America* v. *Hercules Powder Company* which illustrates the trouble into which a witness can get if he is not qualified to testify both from the seismological and the architectural standpoint:

(One of the leading seismologists is sworn).

Question: What is your profession?

A. I am a seismologist.

Q. What is that?

A. A student of earthquakes and vibrations.

Q. I wish you would describe or explain to the jury what the general relationship is between building construction such as of brick or the roof construction such as involved in the Baker Theater and the existence of glass with reference to the effect of explosive force upon it.

Defense Counsel: If your Honor please, I object to this question. There has been no qualification of this man as having anything to do with engineering or constructional engineering or whether he knows anything about structures or buildings. Your Honor has ruled on engineers and their limits on buildings and I think we should have a rule at this point as to the qualifications of that man who is a seismologist on the structural phases of the building.

Plaintiff's Counsel: If your Honor please, I could develop it further. I thought I had. I'd like to ask a few more questions since the question I put to him has been objected to. I'd like to digress a moment to ask a few more questions about his studies in that regard.

The Courts: The witness has testified that he has studied the effects of air waves through the ground or the force of explosions through the air and studied the effects upon buildings. But, I think it may be well to ask him some more questions because, as far as I remember, that is as much as he said.

Q. And have you made experiments and given study to the effect of the transmission of explosive force through the air as related to glass.

A. Yes.

Q. Windows and so forth?

A. Yes.

Q. My question was, and I will repeat substantially, as I did before. . .

Defense Counsel: If your Honor please, I still make the same objection that I made to this same question before. This witness is not qualified as an engineer in any sense of the word and he is not qualified to testify as to the structural effect or to the effect on structures because he hasn't even indicated that he has made any study of it and the study referred to, of course apparently private study, so that I feel that he is not qualified in any fashion to testify concerning structural damage to buildings as a result of either air blasts or even as the result of earth blasts.

In order to permit proper scope of testimony and at the same time prevent continual harassing objections to testimony of your own witness by the adversary it is not only desirable to obtain an expert of broad qualifications but he must be qualified before the court in all the ramifications of this broad training and experience. There are men who can qualify as registered architects and structural engineers as well as seismologists and explosive engineers. This combination of professions is rare, since they are not ordinarily complementary or useful to each other, but due to chance they do exist.

"Persons constantly engaged in special lines of activity possess knowledge of certain facts not known by ordinary persons." "The theory is that experts have knowledge, training, and experience enabling them to form a better opinion on a given state of facts than that formed by those not so well equipped, which is the case of the ordinary juror, and their opinions are admitted in evidence for the purpose of aiding the jury to understand questions which inexperienced persons are not likely to decide correctly without such assistance" (*e.g.*, 20 AM. JUR., *Evidence* #783 and 775).

Blast damage and commercial vibration cases present a unique situation in that it is necessary for the expert to first explain exactly what the facts are and then draw a conclusion based upon these facts for these matters are so utterly unintelligible to the average juror that he is unable to arrive at a proper conclusion even when the facts are clearly explained. This is a neces-

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A Universal Wills Law:

A Necessity in an Atomic Era

by Edward J. Gould • *of the New York Bar (New York City)*

■ **In a world that has become considerably smaller since the turn of the century, uniformity of law becomes increasingly important. The law of wills varies greatly from state to state and from nation to nation, as every lawyer knows. Mr. Gould points out the inconvenience of such variation and urges a program to obtain some sort of uniform, universal legislation on the subject.**

■ Our diversified far-flung fifty-three[1] states, of course, yield different and sometimes conflicting laws concerning the same juridical subject. These diversities are, nevertheless, diminishing. The trend in law is unmistakably toward uniformity.

This wholesome trend is abundantly evidenced by the proceedings of the American Bar Association and other lawyers' organizations, including associations composed of Attorneys General, prosecuting attorneys, surrogates or probate and other judges, who are concerned with common problems or interests.

The most noteworthy agency in this dedicated movement for greater congruity in the national juristic sphere is, of course, the National Conference of Commissioners on Uniform State Laws. The lively and studious meetings of the Commissioners reflect the conspicuous accomplishments of the Commissioners in manifold fields of law and their valiantly persistent efforts to attain still further concordance. Almost every branch of the law with an interstate significance has been dealt with, and the adoption by the states of virtually all existing uniform acts is due to the work of the Commissioners. A compendium of the uniform laws thus championed would fill quite a tome.

Furthermore, despite global tension and the apparently irreconcilable division of the world into Communist and anti- or non-Communist nations, nevertheless—and perhaps paradoxically—never before have nations worked so closely together for their common good. The many international agencies, official and otherwise, attest this heartening fact. These agencies relate to endeavors in virtually every phase of life.

The major official international organization is, of course, the United Nations, with its present membership of eighty conglomerated, diversified, autonomous nations united in quest of a better and more peaceful and solidified world.

In addition to official agencies, many voluntary unofficial associations are meeting and discussing and essaying to solve problems common to all nations and to all people. Among these are the International Bar Association and the American Foreign Law Association.

Easier and speedier facilities for locomotion have resulted in a larger number of persons owning and maintaining homes in more than one jurisdiction. The U.N. alone has made New York the residence or mecca for people from all over the globe.

These observations are, germane to this thesis, *viz.*, that there is desirability, if not need, for universality respecting at least some phases of the law of wills.

Few categories in the entire repertory of law affect so many people as the law of wills—death being one of the certainties of life.

The Law of Wills . . . *In 116 Different Countries*

The writer has examined the laws of 116 juridical spheres—every autonomous jurisdiction in the world, with the exception of the Soviet satellites, Bulgaria, Czechoslovakia, Hungary, Poland and Rumania, and every one of the 116—including the U.S.S.R.—has laws on wills. Universally, the tales of dead men are often told in their wills.

Not only is this subject timeless

1. Including Alaska, the District of Columbia, Hawaii, Puerto Rico and the Virgin Islands.

and global, but it will become increasingly heightened by reason of the multiplicity of travelers, and because of the perilous Damoclean sword, concocted of nuclear fission, that hangs over us. Certainly, the sneaky and lethal nature of the bomb accelerates the importance of holographic and nuncupative wills. Heretofore, these wills, especially the nuncupative, have been deemed of greater urgency to those in military, naval and marine service (the term "service" hereinafter used will include all branches of the Armed Services) than to civilians. Indeed, many jurisdictions, both here and abroad, restrict the use of these forms of will to those in service.

But that the subject of holographic and nuncupative wills, in the present state of our bomb-threatened world, is now of importance to civilians as well as to those in uniform, is obvious. All of us live under explosive skies. It is not unlikely that the sudden shrieking of the siren, driving one into an air-raid shelter, will evoke the realization that he hadn't got around to making a will, or to changing an existing will.

Every jurisdiction has its own statutes regulating virtually every phase of wills—capacity to make, formalities, revocation, probate, contest, descent and inheritance, kinds of wills recognized, etc. These regulations, of course, differ in the various jurisdictions. These divergencies have been the concern of the National Conference of Commissioners on Uniform State Laws since at least 1895.

Recognizing that uniformity with regard to all aspects of wills was not possible, even if it were desirable, the Commissioners dealt first with (a) uniformity regarding foreign executed wills, and (b) uniformity regarding foreign probated wills.

In 1910 the Commissioners approved a short and simple act with respect to (a), which was identical with the old Act of 1895. In 1915, an Act was approved with respect to (b), but it was withdrawn by the Commissioners in 1943.

The Foreign Executed Wills Act was adopted by fourteen states, namely: Alaska, Hawaii, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Nebraska, Nevada, New York, Rhode Island, Utah and Wisconsin. The Foreign Probated Wills Act was adopted by eight states: Alaska, Kansas (in part), Louisiana, Nevada, Rhode Island, Tennessee, Wisconsin and Wyoming.

Not satisfied with the comparatively small number of states adopting the 1910 Uniform Foreign Executed Wills Act, the Commissioners continued to accord the subject consideration. It was deemed advisable to formulate a more comprehensive act, and to this end an exceedingly able committee worked for three years. At the San Francisco meeting of the Commissioners in 1939, the second tentative draft of the Committee's Uniform Act on the Execution of Wills was dissected and debated. The following year, in Philadelphia, the Conference adopted the following commendable Model Executed Wills Act. (See footnote.)

Inasmuch as Section 7 of the 1940 Model Act covers the 1910 Act, the latter became obsolete, and, hence, was withdrawn.

Although some of the provisions, in substance, at least, of the 1940 Model Act constitute law in many of the states, the entire act has been adopted only in Tennessee.

Now, considering the universal importance of the subject, it is here suggested:

First, that the legislatures of the several states be pressed to enact into law the Model Executed Wills Act.

Second, that a movement be initiated for the adoption by all countries of the Model Act, or a measure as similar thereto as is attainable.

Section 1. *Definitions.* As used in this Act the following definitions apply:

(1) "Person" includes either man or woman, single or married; and each masculine pronoun includes the corresponding feminine pronoun.

(2) "Will" includes codicil.

Section 2. *Who May Make.* Any person of sound mind eighteen years of age or older may make a will.

Section 3. *Who May Witness.*

(1) Any person competent to be a witness generally in this state may act as attesting witness to a will.

(2) No will is invalidated because attested by an interested witness; but any interested witness shall, unless the will is also attested by two disinterested witnesses, forfeit so much of the provisions therein made for him as in the aggregate exceeds in value, as of the date of the testator's death, what he would have received had the testator died intestate.

(3) No attesting witness is interested unless the will gives to him some personal and beneficial interest.

Section 4. *Execution.* The execution of a will, other than a holographic or nuncupative will, must be by the signature of the testator and of at least two witnesses as follows:

(1) *Testator.* The testator shall signify to the attesting witnesses that the instrument is his will and either

(a) Himself sign, or

(b) Acknowledge his signature already made, or

(c) At his direction and in his presence have someone else sign his name for him, and

(d) In any of the above cases the act must be done in the presence of two or more attesting witnesses.

(2) *Witnesses.* The attesting witnesses must sign

(a) In the presence of the testator, and

(b) In the presence of each other.

Section 5. *Holographic Will.* No witness to a holographic will is necessary, but the signature and all its material provisions must be in the handwriting of the testator and his handwriting must be proved by two witnesses.

Section 6. *Nuncupative Will.*

(1) A nuncupative will may be made only by a person in imminent peril of death, whether from illness or otherwise, shall be valid only if the testator died as a result of the impending peril, and must be

(a) Declared to be his will by the testator before two disinterested witnesses;

(b) Reduced to writing by or under the direction of one of the witnesses within thirty days after such declaration; and

(c) Submitted for probate within six months after the death of the testator.

(2) The nuncupative will may dispose of personal property only and to an aggregate value not exceeding one thousand ($1000 dollars, except that in the case of persons in active military, air or naval service in time of war the aggregate amount may be ten thousand ($10,000) dollars.

(3) A nuncupative will neither revokes nor changes an existing written will.

Section 7. *Foreign Execution.* A will executed outside this state in a manner prescribed by this Act, or a written will executed outside this state in a manner prescribed by the law of the place of its execution or by the law of the testator's domicile at the time of its execution, shall have the same force and effect in this state as if executed in this state in compliance with the provisions of this Act.

Section 8. *Scope.* This Act shall not apply to wills executed in this state before the date of its taking effect nor to wills offered for ancillary probate in this state which have been admitted to probate in the state or country of the testator's domicile.

Section 9. *Severability.* If any provision of this Act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

Section 10. *Repeal.* All acts or parts of acts which are inconsistent with the provisions of this Act are hereby repealed.

Section 11. *Time of Taking Effect.* This Act shall take effect. (.....)

Patent Difficulties . . .
An Ambitious Program

To be sure, the difficulties in achieving these results are all too patent. Getting the Act adopted by our fifty-three states is, in itself, a vastly ambitious and troublesome program. But even if it is not practical to get the Act, in its entirety, adopted by all the states, persistent efforts should be made to go as far as possible. The campaign for the adoption of the Act by the various countries would be extremely laborious, yet worthy of trial.

Let us deal first with the states, and note just a few of the differences and difficulties. To go into detail respecting all the provisions of the Act, and extensively compare all the provisions with existing laws, would be neither expedient nor advantageous.

It goes without saying that the requirement that the testator be of sound mind is universal.

In thirty states the age of testamentary competency is 21 or older. In Alabama an eighteen-year old may will personalty. In Arizona a person who may be or has been lawfully married is of testamentary capacity. In the District of Columbia, whereas a female of 18 may make a will, the male must be at least 21. In Maine, a married person, widow or widower of any age may dispose of his or her real or personal property by will. In Maryland, by common law, males 14 or older and females 12 and older may make valid wills of personal property. Mississippi sets no statutory age. In New Hampshire, though the age generally is 18, a married person under that age is testamentally competent. In New Jersey and Pennsylvania one of 18 or over in active military service in time of war is testamentally competent. In New York and Virginia, where the age generally is 21 or older, one of 18 may dispose of personalty. In Puerto Rico the age is 14 or older. Although the age in Texas is generally 21 or more, it is lower for a person in service or who has been lawfully married. In Washington one of 18 and legally married and actively engaged with the Armed Forces, possesses testamentary capacity. In Wisconsin, a married woman of 18 or older, or a minor in service, is vested with testamentary capacity.

Although in the majority of the states the testator must have reached 21, fixing the age in the Act at 18 seems judicious. In Georgia an 18-year old may vote, and President Eisenhower has recommended that such privilege be made nation-wide. Youths of 18 are inducted into service, and marriage at that age is permissible in virtually all the states, although in the majority the consent of the parents of males under 21 is required. Hence, a uniform age of 18 would not disturb any gravely fundamental law, but it would, rather, accord with the salutary trend.

Since all but six of the states require only two attesting witnesses, that number, fixed in the Model Act, would seem advisable. The six require three, but in Pennsylvania none is required.

The provision in the Model Act that evoked more debate than any other of the 1939 and 1940 Conferences is that the witnesses sign in the presence of the testator as well as in the presence of each other. Yet this safeguard does not seem too exacting.

In several states each page of the will must be signed by the testator and the attestation clause must specify the number of pages comprising the will. This would seem a needless augmentation of the technicalities. As Willard B. Luther, the Chairman of the Committee that drafted the Model Act, cogently stated: ". . . when you are dealing with a relatively simple thing, when you try to multiply the safeguards, you generally multiply the difficulties, because every safeguard is a new avenue of attack. . . It has never been the hope of the Committee that this Act would be so potent that it would automatically stop all further will litigation. . ."

The provision in Section 3 (1) that "Any person competent to be a witness generally in this state may act as attesting witness to a will", should satisfy all the states, regardless of their present law in this respect. Also, subdivisions (2) and (3), concerning the interest of witnesses, should meet with general approval, though they would run counter to laws abroad, especially in most of the Latin-American countries.

Edward J. Gould has practiced in New York City since 1918 after his graduation from New York University. As attorney, referee or guardian, he has handled many cases involving the estates of prominent persons, including William Waldorf Astor.

Holographic wills are expressly authorized in twenty-one states and not recognized in twenty-five. A few of the states are silent thereon. In Connecticut and Hawaii such a will is recognized if valid where made. In Rhode Island a holographic will may be made by a person in service. In Maryland such a will is recognized if made outside the United States by a person in service, but after the expiration of a year from the date of testator's discharge, the will becomes a nullity.

Safeguarded, as provided in Section 5, there are obvious persuasive reasons why all the states should authorize holographic wills.

Likewise, there is divergence among the states concerning nuncupative wills. Under varying circumstances and conditions forty-two states authorize this type of will, and in only seven is it not recognized. But the number of dissenters would probably be augmented by states where the question has not been raised. Practically all the states that authorize such wills limit them to personalty, and more than a dozen restrict their use to those in service.

A changing world demands different measures. Nineteen forty—the year the Model Act was adopted—was—need we recall?—pre-Pearl Harbor, five years before the first A-bomb test at Alamogordo, New Mexico, five years before the bomb was dropped on Hiroshima. Since then, the more horrendous H-bomb has evolved, not only in the United States, but elsewhere, where human life is regarded as none too sacred. Other far-reaching devastating agencies, such as guided missiles, are in the making. The undreamed-of has become possible, the possible probable, and the probable reality. The end is not in sight nor is it foreseeable. The ingenuity of science seems limitless. Can there be doubt, therefore, that the need for the nuncupative will in this potentially holocaustic world is compelling?

With uncanny prescience, the framers of Section 6 provided that a nuncupative will "may be made only by a person in imminent peril of death, whether from illness or otherwise", and "shall be valid only if the testator died as a result of the impending peril". Thus, the availability of the nuncupative will is no longer restricted to those in service. The other provisions of Section 6 seem to supply abundant safeguards to meet any objections of the opponents of the nuncupative will. Indeed, in view of the nuclear weapons which threaten us, consideration might be given to enlarging the provisions of the act to include realty as well as personalty (though formidable, if not insuperable barriers are not merely imaginary), and to eliminating the limit of the value of the personal property subject to disposition by a nuncupative will. (The $10,000 limit derives from service insurance.)

Even when the fear of nuclear weapons vanishes or abates—as is inevitable—there will still be want for some degree of uniformity respecting holographic and nuncupative wills. Peace will not cancel the want. Peace will multiply the nomads, and thus multiply the occasion for uniformity.

Since all the states recognize foreign executed wills, there should be little, if any, opposition to the adoption of Section 7 of the Model Act.

And although the Commissioners, in 1943, withdrew the Uniform Probated Wills Act, eight states, as already indicated, adopted it before the withdrawal, and there appears no potent reason why some form of uniformity with respect to foreign probated wills should not be achieved by the states.

Opposition to adopting the entire Model Act may come from states whose laws are so out of line with the laws of other states as to make such adoption too radical a departure.

Naturally enough, considering her Spanish-French backgrounds, pirate lore, picturesque customs and Napoleonic Code, the law of wills in Louisiana differs widely from that of any other state, with the possible exception of Puerto Rico. In Louisiana, a minor of 16 has testamentary capacity, but he may not make any disposition in his will in favor of his tutor, preceptors or instructors, while under their authority. Likewise, disposition to physicians or surgeons who have attended the testator during the sickness of which he died, and to ministers, is restricted. There are like provisions in many foreign jurisdictions. And, also as in many alien lands, Louisiana has four classes of donations *mortis causa* or testament: (1) nuncupative or open; (2) mystic or sealed; (3) holographic; (4) statutory. These are subject to more protectives than surround wills in other states.

Puerto Rico, likewise due to its Spanish heritage, has laws common to Latin-American countries. Wills there are either (a) common or (b) special. Common are (1) holographic, (2) open and (3) closed. Special are (1) military, (2) maritime and (3) foreign. The hour of signing the will must be recorded. The testamentary age, as in Georgia, is 14, or older.

Here are a few additional peculiarities found in the law of wills in the states:

In Arkansas and Minnesota the testator may deposit his will with the probate court with directions to whom it should be delivered after his death. During his lifetime the will may be delivered only to him or to one authorized by him.

In New York the omission of a witness to write his place of residence after his signature does not invalidate the will but subjects the witness to a penalty of $50.

Also in New York, any testator, regardless of citizenship or residence, may validly and effectively declare in his will that his testamentary disposition shall be construed and regulated by the laws of New York.

Again, New York specially provides for cases where a United States citizen or an alien female whose father or husband previously has declared intention to become a citizen, dies while domiciled or resident within the United Kingdom of Great Britain and Ireland or any of its dependencies, leaving a will which has been proved or established in such foreign jurisdiction affecting property within New York.

Rhode Island requires no seal.

In Texas a witness may be 14.

Hawaii is the only state wherein the testamentary age is fixed at 20 or over.

In Arkansas any interested person desiring to be notified before a will is admitted to probate may file with the probate court a request for notice, and thereafter no will may be probated until notice has been given.

In Alabama, whereas marriage of a woman effects the revocation of

(Continued on page 183)

How Large Is the Budget?

Measuring the Size of Our National Debt

by **John D. Garwood** · *Professor of Economics at Fort Hays State College (Kansas)*

■ By this time, we are probably all used to the fact that the national budget runs in figures of eleven digits, and perhaps the word "billion", when used in connection with public finances, has lost whatever meaning it once may have had. In this article, Dr. Garwood has undertaken the task of showing just how large the national budget is.

■ In the last three fiscal years, 1954, 1955, 1956, the United States Government spent $193,000,000,000. In 152 years from the time of George Washington's first inauguration in 1789 to 1940, the Government spent $167,000,000,000.

In a single month in 1956, the Government spent almost twice as much as the total costs of the Government during the four years of the Civil War.

In the fiscal year closing June 30, 1956, federal spending exceeded the combined cost of all U.S. wars prior to World War II. The two-year cost of World War I was $31,000,000,000. The Government now spends more than that in six months.

History tells us that government functions and costs never stop growing. Postwar spending never goes back to prewar spending. Nine million dollar budgets were the rule prior to the War of 1812. The budget was twice that following the war.

After the Civil War the budget was over three times the prewar budgets of $60,000,000–$70,000,000.

Federal expenditures were about $350,000,000 annually before the Spanish-American War, more than a half billion dollars annually following the war.

Before World War I, U.S. Government spending was about $700,000,000 per year. It was about four times that after the war.

Before World War II, during the thirties, spending by the Government ranged from $6,000,000,000 to $9,000,000,000 per year. From 1946-1950, following World War II, expenditures were in the neighborhood of $40,000,000,000 per year.

Following Korea, expenditures rose to around $65,000,000,000 per year.

Proposed expenditures for the fiscal year 1957 (July 1, 1956, to June 30, 1957) are set at approximately $66,000,000,000. The President's budget set forth in 1,534 pages of finely printed material, weighs in at about six pounds or about ¾ of a billion dollars per ounce.

It is so large, it covers so many fields of human endeavor, put together through tens of millions of man-hours, that no one, not even the budget director, can possibly fully comprehend it.

How large is the budget? How much is $66,000,000,000? Large is a relative term. Anything is large or small only when compared to something else. Thus, the point of a pin is large when compared to an atom, an elephant when compared to a cat, etc.

The magnitude of the budget is indicated when we realize that the budget is large regardless of the economic unit we use for comparison. It dwarfs other economic institutions and functions with which we are familiar. It is like comparing the Hoover Dam to a child-made dam in the gutter of a street after a rain.

If total federal spending were made in dollar bills, laid end to end, they would reach 6,250,000 miles. This would encircle the earth 250 times or make thirteen round trips to the moon.

Federal spending for the fiscal year 1956 is equivalent to the income made by people in the Pacific Coast states, the Rocky Mountain states, plus the States of North and South Dakota, Nebraska, Kansas, Oklahoma, Texas, Minnesota, Iowa, and Missouri, or a total of the income of the people in the twenty western states.

It is over twice as large as the amount of currency in circulation. It is three times larger than the amount of gold held in Treasury vaults.

If paid out as a bonus to every

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Signed Articles
As one object of the *American Bar Association Journal* is to afford a forum for the free expression of members of the Bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of the *Journal* assume no responsibility for the opinions or facts in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

■ *Comparative Negligence*

The American field of jurisprudence and practice, in which the average lawyer finds his livelihood, is subject to a constant and continued change. Nowhere has this been more marked than in the field of law governing personal injuries and property damage, based on negligence. Tremendous changes in transportation, which have occurred in the space of a century, have had a terrific impact on the old common law rule of contributory negligence and in this issue of the JOURNAL we offer to our readers an article on this subject prepared by David G. Bress, of the District of Columbia Bar, which proved interesting to the editorial staff and we trust will be equally so to the great majority of our readers. Well over half of the jurisdictions in this country have seen fit to adopt statutes which, in some form or other, modify the contributory negligence rule as it existed at common law. The address by Mr. Bress, delivered before the Federal Judicial Conference of his District, presents some scholarly and very sound arguments in support of the comparative negligence rule and we are confident you will find it both interesting and instructive.

Editor to Readers

At Dallas last summer, during the sessions of the House of Delegates, it was our pleasure to welcome and extend greetings to our illustrious guests from foreign shores—Sir Reginald Edward Manningham-Buller, Attorney General of England; Sir Edwin Savory Herbert, President of the Law Society of England; Colonel Paul P. Hutchison, President of The Canadian Bar Association; Honorable Nazir Ahmad Khan, President of the Pakistan Bar Association; and Mr. Styrbjörn Gärde, of Stockholm, a member of the Bar of Sweden and son of Sweden's Chief Justice.

Sir Reginald, Sir Edwin and Colonel Hutchison all delighted their audiences at Assembly meetings with their learned and scholarly addresses, eloquently presented; Mr. Ahmad Khan greatly charmed those privileged to hear him on less formal occasion, and Mr. Gärde wrote pleasantly of us and our meeting in the *Swedish Law Journal*. He said, in part, "The interest of American lawyers in the contact with their West-European colleagues was pronounced. They are most appreciative of the work done by the International Bar Association. . . As to the rest of the meeting it was characteristic of a very effective organization, and an extraordinarily kind and hospitable one. It is remarkable how strong the contacts with Scandinavia are and how much the Scandinavian countries are appreciated."

Members of the Association planning to attend the 1957 Annual Meeting in London July 24-30 should apply for passports as early as possible—preferably at least four months prior to time of departure.

Passports may be obtained from any United States Passport Agency (offices are located in New York, Chicago, New Orleans, Los Angeles and San Francisco) or from the Passport Bureau, U. S. Department of State, Washington 25, D. C. Applications may be filed with any federal, state or county court authorized to accept them.

Passport applicants must give evidence of U. S. citizenship, furnish two passport size (2½x2½) photographs and pay a $10 fee. Unless an old U. S. passport is presented, applicants must bring a witness, who may be a relative. Married couples may travel on the same passport.

Legal Education:

Desegregation in Law Schools

by Robert A. Leflar • *Professor of Law, University of Arkansas*

■ **The first case in the series of Supreme Court decisions that led to the 1954 decision outlawing racial segregation in schools involved a Negro who sought admission to a law school, and the law schools of the country have been in the center of the problem of "desegregation" ever since. In this article, Professor Leflar sets forth the position of the Association of American Law Schools on this delicate question of public policy which has divided the country more sharply than any domestic issue since the days of the Civil War.**

■ Are American law schools teaching respect for law to their students by concrete example as well as by abstract lectures in the classrooms, or are they violating in practice the principles which they teach in their courses?

Specifically, what are the law schools, individually or as an organized group, doing about compliance with the Supreme Court's rulings concerning admission of Negroes to publicly supported law schools? This is a question which law teachers nowadays are often asked, and one not infrequently directed by laymen to lawyers generally. The question furthermore is one that has given rise to a great deal of soul-searching at the annual meetings of the Association of American Law Schools and between meetings as well. In these discussions, not only tax-supported law schools but privately endowed ones are involved. All the law schools have been taking the question seriously. This article is in the nature of a report to the Bar on what the schools are doing about it.[1]

As most lawyers know, the Association of American Law Schools (hereinafter called AALS) is an organization made up of the nation's leading law schools joined together for the improvement of the legal profession through legal education. It is a child of the American Bar Association, in the sense that its original creation in 1901 was under the aegis of that parent group, and that all its 108 member schools are on the American Bar Association's list of approved law schools, though a few schools on that approved list have not yet become AALS members. The annual three-day meetings of AALS are largely devoted to discussions by law school faculty members, judges and practicing lawyers on how law should be taught, what courses should be in the law curriculum, what subject matter should be in the courses, and how law schools should be administered. Membership in AALS is highly prized, not because the organization is an accrediting body but because its rigorous though reasonable standards and objectives give recognized public assurance that member schools are genuinely interested in doing a good job of legal education. Schools are seldom dropped or suspended as members. Representatives of the American Bar Association's Section of Legal Education always participate in the AALS annual meetings.

Though refusal to admit Negroes to public law schools became a legal issue in the 1930's, it was not until 1950 that AALS took formal cognizance of the problem. At the regular meeting held in December of that year a group from the Yale Law School presented a proposal that "No school which follows a policy of excluding or segregating qualified applicants or students on the basis of race or color shall be qualified to be admitted to or remain a member of the Association." Instead of acting at once, either affirmatively or negatively, upon the proposal, the Association adopted a resolution opposing generally the

1. The article is written at the request of the Special Committee on Racial Discrimination of the Association of American Law Schools. Dean F. D. G. Ribble of the University of Virginia School of Law, former President of the Association, is chairman of the committee. Other members are Alfred L. Gausewitz, New Mexico; William B. Lockhart, Minnesota; Frank R. Kennedy, Iowa; Antonio E. Papale, Loyola, New Orleans; Charles W. Quick, Howard; Brainerd Currie, Chicago; Frank R. Strong, Ohio State; John W. Wade, Vanderbilt.

practice of racial discrimination in legal education and setting up a committee to study the problem and report back a year later with recommendations. The committee was made up of Elliott E. Cheatham, Columbia University, Chairman; David F. Cavers, Harvard; Shelden D. Elliott, Southern California; Albert J. Harno, Illinois; and Charles T. McCormick, Texas.

A short review of the legal and factual situation as it existed when this committee commenced its study will be helpful.

The University of Maryland Law School had in 1936 been ordered to admit Negroes on a non-discriminatory basis[2] and from that time on did so. The University of Missouri had in 1938 been told that its practice of excluding Negroes and providing them with financial aid for attendance at out-of-state law schools did not satisfy the "separate but equal" concept[3] which was then assumed to control, and Missouri proceeded to set up a separate Negro law school at Lincoln University while continuing to exclude Negroes from the University of Missouri Law School. The University of Arkansas in 1947 faced the problem squarely by recognizing that the state was financially unable to maintain a separate Negro law school of equal quality and without litigation became in January, 1948, the first school in the Old South to admit a Negro to its classes.[4]

A measure of segregation within the law school was at first enforced but broke down under pressures exerted by the white students. Federal court orders induced the admission of Negroes to the law schools of the University of Kentucky and the University of Oklahoma in 1949 and to the University of Virginia and Louisiana State University in 1950. It was also in 1950 that the State of Texas was told that its "separate" law school, though expensive, was not "equal" to the University of Texas Law School and that Negroes must be admitted to the latter,[5] which was promptly done. A graduate school case at the University of Oklahoma in 1950 forbade segregating practices within that university,[6] though the famous *Sipuel* case[7] which compelled admission of a Negro to the University of Oklahoma Law School came somewhat earlier. That was the legal situation at the time the committee commenced its study. By the time it made its report in December, 1951, court orders had brought admission of Negroes also to the University of North Carolina, and William and Mary College, a state institution in Virginia, had announced voluntary compliance for its law school. In addition, nine non-state universities[8] in the Southern area were following a practice of admitting Negroes to their law schools.

With this background and after a comprehensive analysis of the discrimination problem,[9] the committee recommended to the December, 1951, AALS meeting at Denver that the Yale proposal not be adopted and that a less rigorous but still definite position be taken. After vigorous debate, this recommendation was accepted, the result being approval by AALS of a resolution declaring that "Equality of opportunity in legal education without discrimination or segregation on the ground of race or color is beneficial to legal education, and will contribute to the improvement of the legal profession. It is in accordance with our democratic creed and would enhance our nation's influence in world affairs." This was followed by adoption of a new "objective" which "the Association shall encourage its members to maintain":[10] "Equality of opportunity in legal education without discrimination or segregation on the ground of race or color." The principal argument that induced adoption of this "objective" rather than the proposed sanction of exclusion from the Association was that the evident trend among Southern schools toward voluntary admission of Negroes would be sustained better by persuasion than by the threat of exclusion. Seventeen schools voted against taking any action at all, eighty-five voted for the "objective" as adopted, and six did not vote.

Against Opposition . . .

A Convincing Reply

One argument presented by some of the seventeen schools that opposed the new "objective" was that it did not relate to academic standards and the quality of law school performance as such, but rather to social policy, and therefore was outside the AALS field of competence. The committee's convincing reply to this can be summarized briefly.

The reply commenced with the AALS function which, according to its articles, is not merely the policing of legal education but "the improvement of the legal profession through legal education". It then proceeded to show that admission of Negroes to so-called white law schools would undoubtedly improve the legal education of the Negroes and so improve them as members of the legal profession, since most of the separate Negro schools were simply not as good as the established white law schools. Next, it indicated a likelihood of good effects on white law students also in three

2. *University of Maryland* v. *Murray*, 169 Md. 478, 182 Atl. 590, 103 A.L.R. 706 (1936).

3. *Missouri* ex rel. *Gaines* v. *Canada*, 305 U.S. 337 (1938).

4. Advance agreement to the move by the University's Board of Trustees, by Ben Laney (then Governor of Arkansas) and by many other official and unofficial groups in the state was secured by Robert A. Leflar, then Dean of the Law School, and was in general based not on any crusading interest in Negro rights but on a frank recognition of the state's financial limitations plus a desire to avoid disagreeable and ineffectual litigation. The first Negro admitted was Silas Hunt, of Texarkana, who died in a Veterans Hospital before completing the first year of his course. Next was Jackie Shropshire, of Little Rock, admitted in September, 1948, and graduated in June, 1951.

5. *Sweatt* v. *Painter*, 339 U.S. 629 (1950).

6. *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637 (1950).

7. *Sipuel* v. *Board of Regents of University of Oklahoma*, 332 U.S. 631 (1948); *Fisher* v. *Hurst, C. J.*, 333 U.S. 147 (1948).

8. University of Louisville (Kentucky), St. Louis University (Missouri), University of Kansas City (Missouri), Washington University (Missouri), St. Mary's University (Texas), American University (District of Columbia), Catholic University (District of Columbia), Georgetown University (D.C.), Howard University (District of Columbia), had always admitted all races.

9. *AALS Handbook* (1951) 278.

10. AALS Articles of Association provide for "requirements" with which all member schools must comply, "standards" which furnish a guide in measuring compliance, and "objectives" which specify the aims or ideals toward which all member schools are expected to strive.

specific areas: (1) they would meet able and intellectual Negroes and thus get acquainted with a group with whom they would have to deal in a professional way later; (2) when matters involving racial issues are discussed in the classroom, particularly in constitutional law and criminal law, the discussion would be rendered more responsible and informed by the participation or even by the presence of Negro students; (3) white students acquainted with intellectually capable Negroes would be less likely thereafter to tolerate unjust racial discriminations in law and its administration. All these reasons were stated in view of the fact that we are not training today's law students to practice in the last half-century but in the next half-century. Finally, the obvious point was made that the cost of a separate Negro law school, if added to the budget of the regular law school, could make it a better law school than either was before.

A two-year committee was set up in 1951 to aid in effectuating the new "objective", with directions to confer and co-operate to this end with member schools. Law teachers named to this committee were David F. Cavers, Harvard; Jefferson B. Fordham, Pennsylvania; Albert J. Harno, Illinois; W. Page Keeton, Texas; Wex S. Malone, Louisiana State; John Ritchie III, Wisconsin; Elvis J. Stahr, Jr., Kentucky; Leon H. Wallace, Indiana; D. W. Woodbridge, William and Mary; and Robert A. Leflar, Arkansas, Chairman.

A principal activity of this committee was to study what had happened in schools recently admitting Negroes for the first time, so that advice and information based on such experience could be made available to other schools contemplating Negro admissions. Some interesting generalizations can be drawn from this study.[11]

The consensus of the schools was that it is not desirable to try in advance to adjust public opinion generally to the new move either in the community or on the campus apart from the law school. When no such effort is made the school takes full responsibility for what it has done. Widespread publicity is not helpful, though this cannot always be controlled. There have however been instances of local co-operation where publicity was negligible.

Most of the deans thought it had been worthwhile to talk with law student organizations and leaders in advance so that these would know what was going on and could co-operate if they wished. Law students in general were sympathetic with Negro admissions. Many deans found it desirable to talk with some leading students outside the law school, such as the editor of the student paper and officers of the student body, to explain the legal and other reasons for admitting Negroes.

There was division of opinion as to how closely the dean should maintain contacts with Negro students after admission so as to know about their current problems, help them over rough spots, anticipate and guard against unpleasant incidents. Most deans felt that the thing to do was to treat Negroes exactly like other students, with no special attention shown. Others felt that special conferences were part of the dean's job when any student was faced with peculiar problems and that the first Negroes admitted were bound to have such problems.

Some difficulties occurred because many Negroes having paper qualifications for admission to law school are actually not as well prepared for the rigors of serious law study as students that have enjoyed better college preparation. More than a proportionate number of low grades to Negro students may result, and unfair charges of discrimination in grading can ensue. The sort of careful selection of students that is possible in law schools relying upon their own admissions and aptitude tests, in addition to the paper record of pre-law courses completed, can to some extent avoid this difficulty. Personal contact between faculty and student will usually eliminate any feeling that there might be or has been discrimination. Further, law school contacts with leading Negro citizens that are specially interested in charges of discrimination can do much to prevent such unfounded charges from being made in the first place.

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These and other analyses of experience were offered to interested schools, and were presumably helpful. By Christmas of 1953 four more schools, the University of Tennessee, Baylor of Texas, Loyola of New Orleans and Southern Methodist University of Texas had announced compliance with the AALS "objective". In 1954 two other schools, George Washington University (D.C.) and the University of Missouri, admitted Negroes. One additional school has indicated its readiness, when qualified Negro applicants appear, to admit them. This

11. Parts of this article are quotations freely taken from AALS committee reports, without use of quotation marks.

leaves fifteen[12] out of 108 AALS schools that have not yet formally accepted the "objective", though several of these in fact have not received any Negro applications.

That was the situation in 1955 when the issue was again presented as to whether the "objective" should be changed into a "requirement" for AALS membership. A majority of the 1955 committee, headed by David F. Cavers of Harvard,[13] proposed adoption of new rules about midway between the rigorous exclusionary requirement presented by the Yale group in 1951 and the "objective" which had then been adopted. This proposal in essence was that schools might be excluded from AALS for racially discriminatory practices but only after investigation of all the surrounding circumstances and with the possibility that exclusion might be deferred if it were found that there was a substantial prospect that within a reasonable time the school would adopt policies consistent with the "objective". No action would be taken against a school which had excluded no Negroes because none had applied even though the school had not announced willingness to accept them should they apply. A minority of the 1955 committee opposed the majority proposal, feeling that it went too far. At the same time a group from the University of Pennsylvania, taking the view that the committee proposal did not go far enough, urged that the existent "objective" be changed into a "requirement", so that non-complying schools could not thereafter be AALS members.

These proposals were voted on at the December, 1955, AALS meeting. The first action was on the Pennsylvania proposal, which was overwhelmingly defeated. Only seven schools voted in its favor. Then the proposal by the committee's majority was also defeated. The vote was fifty-three schools in favor of the proposal and forty-four against it, with a few schools absent or not voting. It thus failed to secure the two-thirds majority required by the AALS articles of association. The result was that the AALS position was left as it was established in 1951, with the "objective" of "equality of opportunity in legal education without discrimination or segregation on the ground of race or color" still in force and a committee charged with the duty of working toward implementation of the "objective". The reasoning that induced this conclusion was largely the same as that which motivated the 1951 determination, namely, that the desired end of compliance with the "objective" by all law schools would be better accomplished by continuing persuasive efforts than by threatened exclusion of schools from the organization.

Negroes Admitted . . . *Quietly and Easily*

One major fact which encourages hope that the problem will be worked out in peaceful fashion is that acceptance of Negro students at law schools to which they have been newly admitted has been quiet, easy and uneventful. The white students have either been friendly with the Negroes or have ignored them, according to their personal inclinations. In every instance Negroes were accepted into the student professional life of the school to the extent justified by their scholastic and general competence. No ostracism was apparent, and no noticeable social uneasiness has been reported among either white or Negro law students. That is the effect of information collected by the original AALS committee in 1951, again of surveys conducted by the successor committee which operated in 1952 and 1953, and finally of letters received by the 1956 committee from the deans of all law schools that have admitted Negroes for the first time during the last few years. All of these indicate that the danger of disturbances within the law schools themselves is not among the factors deterring admission of Negroes. The mature common sense of law students as a group renders this irrelevant.

During 1956 the AALS president, M. T. Van Hecke of the University of North Carolina, and the current chairman of the Racial Discrimination Committee, Dean F. D. G. Ribble of the University of Virginia, have arranged through law faculties and university presidents for a number of conferences, on their campuses, with them and with members of their boards of trustees, looking toward a better understanding of the Association's attitude and of the problems confronting the particular schools. No false hope of quick and general success from these conferences is entertained. Opposition in the South to the United States Supreme Court's decisions in the public school cases has spread to include the law school situation also, despite the independent bases for the Court's law school decisions. This is evidenced by the delay in actual enrollment of Negroes at Alabama and Florida though court orders appear to require it. Some university administrators are frightened by the manifestations of physical violence that recently occurred at the University of Alabama, though similar lawlessness has taken place at no other university. The Attorney General of Georgia has announced that, in keeping with a recently enacted state statute, the University of Georgia Law School will be closed if ordered in pending litigation to admit a Negro applicant, and the University of South Carolina Law School is apparently threatened in the same way.[14]

The situation of faculty members in these law schools is not an easy one. They do not enjoy being put in the position of defying the law which they teach, of disregarding

12. Two of these, the University of Florida and the University of Alabama, are subject to current court orders requiring that Negroes be admitted. Ten of the fifteen are private or endowed schools, not state institutions.

13. The 1954 committee, under the chairmanship of Dean Page Keeton of the University of Texas, had recommended that the 1955 committee restudy the situation and present specific proposals for new action to the Association.

14. See McKay, *"With all Deliberate Speed": A Study of School Desegregation*, 31 N.Y.U. L. Rev. 991, 1042, notes 303, 305. The closings would be achieved by withdrawal of all operating funds from state appropriations.

either the letter or the spirit of that respect for law and constituted authority which is best taught by practice as well as by precept. They recognize the inconsistency which their institutions enforce upon them. It is probably true that most of the faculties of the segregated law schools would be willing to admit Negroes were it not for the opposition of university administrations and trustees. Some faculties, however, are opposed and others are divided. Few faculties are willing or able to take the initiative for a change in admissions policies.

It is the AALS position that thoughtful consideration of the facts and principles involved will at this stage best serve to achieve general law school compliance with the law of the land and the Association's "objective". Along those lines the organization is persistently active.

Comparative Negligence

(Continued from page 130)

Department, that one of the main causes for demanding jury trials and the consequent delay will disappear if judges are free to apportion damages. And if plaintiffs will waive jury trials, in those cases the main foundation for the arguments of the opponents of apportionment necessarily crumbles.

I conclude as I began. The District of Columbia permits contribution between negligent joint tortfeasors. The principle of loss distribution between negligent defendants is thus recognized. But, on the other side of the coin, the law sets its face against loss distribution between *plaintiff* and defendant when both are negligent. It is a very poor basis indeed for determining the distribution of loss involved. The obvious and just approach to loss distribution is to spread the loss of the *entire* accident among *all* parties legally responsible—not to distribute a *fraction* of the loss between unsuccessful party defendants.

As a matter of fact, the present state of the law in the District permits distribution of loss between those who are less in need of it, and denies it to those whose needs are greatest. In the usual case, a defendant is insured, and it is the insurance carrier who, through the law of contribution, is able to spread its loss; although it could amply do so among its policyholders without the aid of the law of contribution. The injured plaintiff, however, is in most cases without insurance protection for his loss, but he is made to suffer the entire loss. This is neither rational nor fair. Why the law should distribute a loss to the pocketbook only, as between defendants, and refuse to distribute the financial consequences of a physical injury to the plaintiff, where both parties are partly at fault in each case, is difficult to fathom.

Indeed, the allowance of contribution between negligent joint tortfeasors compels, *a fortiori*, at least an equal measure of loss distribution between plaintiff and defendant. When, in *Knell* v. *Feltman*, we took the enlightened step in favor of contribution, we were, at that precise moment, destroying the very foundation of the doctrine of contributory negligence. Since that day, reason and fairness must convince any open mind that because we divide loss equally between negligent defendants, regardless of disproportionate fault, we must, *at the very least*, do the same as between plaintiff and defendant. This is the American admiralty rule. My position is that we can and should go *further* than the *Knell* v. *Feltman* principle of loss distribution and adopt the rule of comparative negligence in place of contributory negligence. Once we do this, we may be able to adapt the same comparative negligence standard to contribution cases so that complete justice may prevail on *all* sides of litigation. This is the goal toward which our efforts must unceasingly be directed, but which cannot be achieved while the doctrine of contributory negligence prevails.

Our Court of Appeals did not wait for legislation when the other side of that coin was up—and we had *Knell* v. *Feltman*. The Court has done it; the Court can do it again.

And if someday I should be so unfortunate as to represent a plaintiff who may be slightly tainted with the charge of contributory negligence, I shall with the trepidation of a pioneer but with the confidence which is born of sound reason and justice ask the Bench to harken to the call of progress and bury *Butterfield* v. *Forrester* forever.

Books for Lawyers

AMERICAN STATE POLITICS. *By V. O. Key, Jr. New York: Alfred A. Knopf, Inc. 1956. $4.50. Pages 289.*

The author has set himself an ambitious undertaking in view of the vast scope covered, the enormous complexities of state and sectional politics and the lack of truly scientific conceptions upon which he could rely in making safe generalizations. The difficulties about generalizations are set forth so convincingly that the merits of the work are all the more to be admired.

On the other hand, the author, Professor of History and Government at Harvard University, whose book, *Southern Politics*, published in 1949 won the Woodrow Wilson Foundation Award, is truly humble about his opus, which he describes in the title as "an introduction".

The author has dealt with the political make-up of practically every state in the Union, not all from the same angle of political differences, but in one form or another he has contributed largely to our knowledge of factionalism in the states.

He shows the enormous influence of the two-party national system in the control of state governments, at the same time conceding that the "coattail concept" was frequently ineffective and quite often repudiated by strong state candidates.

He clearly demonstrates how short-lived in state officialdom have been the attempts to launch a third party, such as that of the elder La-Follette, the Farmer-Labor, and the Liberal Party in New York. The author does not say so, but his reasoning would seem to give the party known as the "Americans for Democratic Action" a very dim and limited future.

Many of his conclusions are quite obvious but need restating for the benefit of students of politics; for example, that New York's Governor Harriman and Connecticut's Governor Ribicoff probably would not have been elected if General Eisenhower were running at the head of the Republican ticket.

In his discussion of federalism versus nationalism and their effects on state politics and governments, the author moves with great caution because of the imponderables which no one, however expert, can fathom or foresee. He does record, however, the irony of the present plight of most of the Southern politicians in Washington, who during the last quarter of a century were only too happy to forget states' rights during the time when they were enjoying the perquisites of a philosophy of government which stressed an almost total centralization of power, and the present attitude of those same politicians following the Supreme Court's anti-segregation decision, who have made states' rights a slogan, a defensive epithet and a fighting dogma.

There is a good deal of scientific sampling and statistical analysis with numerous charts and graphs, but of necessity the author's judgments in many cases had to be in large measure based on hunches and guesses, because conclusions in this field are frequently not verifiable. For example, the author, pages 35-36, states his belief that General Eisenhower probably pulled Governor Herter to victory in Massachusetts in 1952. Most professional "pols" would agree, but the validity of the judgment is not provable.

Chapter VII is most interesting. It is entitled "Party and Plural Executives: The Lottery of the Long Ballot". This deals with the fate of the party ticket where there is a large number of state elective offices and the bad effects in government of divided allegiance in executive departments. Governor Dewey of New York is quoted as observing "that the election of a Governor and Lieutenant Governor politically opposed to each other involves serious problems".

In a long footnote at page 216 a strong case is made out against the direct primary for executive offices. There is cited the case of a minor clerical employee named John F. Kennedy, which is the same name as that of the distinguished junior Senator from Massachusetts, who, although completely unknown, was elected State Treasurer of the Commonwealth over the aspirant endorsed by the Democratic Primary Convention. Kennedy, the clerk, won the office even though the Republicans carried the Governorship. The author could have cited the Burril-Burrel split in the Republican Party of Massachusetts a quarter of a century earlier. Incidents like these, I am sure, are numerous all over the country, and they may seem to give a basis for the cynical remark of the late Senator Hoke Smith, who said: "It is utterly impossible to overestimate the stupidity of the average American." On the other hand, the eminent poll conductor, Dr. George Gallup, quotes with approval Walter Lippman to this effect: "Objective sampling of opinion ... has ... consistently shown that the American people are saner, more resolute and more enlightened than they are supposed to be".

The author's efforts reveal a great deal of careful study. Considering the dullness of the subject, the style is on the whole quite good though pedantic in parts. There is a serviceable index. This book will have a limited appeal. I predict, however, that it will be required reading in courses on government and political science in all the colleges and universities of this country.

JOHN J. BURNS
Boston, Massachusetts

THE FIRST COPYRIGHT STATUTE. *An Essay on an Act for the Encouragement of Learning, 1710. By Harry Ransom. Austin: University of Texas Press. 1956. $3.75. Pages 145.*

A much needed work on the source of English copyright is presented in *The First Copyright Statute, An Essay on an Act for the Encouragement of Learning, 1710,* by Harry Ransom. The essay is one of a series of studies in the history of English and American copyright and the author, in the preface, declares that the series will consist of (1) the foundations of literary property in England from 1476-1710, (2) copyright controversies in England from 1710 to 1775, (3) English copyright from 1775 to 1950 and (4) copyright in the United States from the colonial period to the present.

"Some years ago," says Mr. Ransom, "when this plan was first made, I went for advice to Thorvald Solberg, who had been the first United States Register of Copyrights. Still deeply interested in literary property, he gave help generously, although his own research had been halted by illness and the burning of his library. At his suggestion, I extended the plan to include shorter studies of major historical documents concerning literary property, beginning with this account of the Statute of 8 Anne, c. 19, the first copyright law enacted by the English Parliament.

"The mere fact of legislation in 1710 is historic. Never before had a national law-making body drawn up a systematic statement of the conditions under which literary property might be owned. The statute's priority in the long list of English and American copyright laws accounts for the fact that since the early eighteenth century it has been mentioned in court more often than any other source of early copyright history. The document has a retrospective significance as well: it is the consummation of more than two hundred years of slow changes which began with the establishment of Caxton's press. The purpose of this essay is to examine the statute in the light of that earlier growth."

Mr. Ransom, a graduate of Sewanee and Yale University, is Professor of English and Dean of Arts and Sciences at the University of Texas. In 1939 he was director of research for the International Copyright League in London.

The "Short Calendar of English Literary Property, 1475-1710" should prove of great value. This work is highly recommended not only to copyright attorneys but to all interested in the history of copyright.

MAX K. LERNER
New York, New York

BATTLES AT THE BAR. *By K. L. Gauba. Bombay, India: N. M. Tripathi, Ltd., 1956. $4.00.*

In Piero Calamandrei's *Eulogy of Judges* there is an account of the lawyer's reactions to the first visit of his client. He is then said to be "by definition a bore". Yet, inevitably, when his story is told, "he has unburdened his heart, and his case is mine". So it often is with the typical volume containing a lawyer's reminiscences. One may pick it up in boredom but, as its tale is told, as the personality of the writer begins to emerge from his tales of conflict, so he becomes a known friend sharing common experiences.

The author, K. L. Gauba, bridges two worlds, the West and the East. He was educated at Downing College, Cambridge, and was called to the Bar from the Middle Temple. He practiced at Lahore (Pakistan) until 1948, when he joined the Bombay Bar.

The book comprises an account of twenty cases classified under the generic titles of love, treason, libel, homicide, lunacy, fraud, contempt, dacoity (robbery), adventure, divorce, constitutional, and a matter of opinion (legal ethics). Yet some of the cases subsumed under these titles raise deep and universal issues of law. The "libel" case, involving a publication impeaching the public career of Lieutenant Governor Sir Michael O'Dwyer, raises the issue whether it is not justice rather than force which makes the law. The *Khwaja* case, captioned under "fraud," and the "New Magna Charta" case, captioned under "contempt", raise the issue of how abuse of judicial power shall be handled under law. If the judges are the ultimate organ of control of the state, *quis custodiet ipsos custodes?* If it be the lawyer who calls public attention to abuse of judicial power, may the judge whose conduct is in question sit as judge in his own cause and punish the lawyer for contempt? Does a lawyer, as an officer of the court, have the duty to ensure that the members of the court live up to their responsibilities? The author, sharing the common heritage of legal traditions and way of thought of the common law world, fought to maintain the purity of the judicial institution to the point of his commitment to prison and insolvency.

When the Government detained a man as a lunatic, without judicial inquiry and as a political act under an archaic law of 1818, it is the law which the author condemns, though others in his culture are disturbed only at the detention in a lunatic asylum of an obviously sane man. Though the Indian courts after liberation may determine that legislative power exists to amend the Constitution so as to deny basic property guarantees originally contained therein, the author questions the political wisdom of such a step and fears its eventual consequences for the political order and democratic freedom. When questions of criminal procedure are at issue, as in the *Rail Car Murders* case, the author questions whether due process can be dependent on the accidental factors of race and relationship to the accused.

One cannot, therefore, put this volume down without wishing that its story had been less that of *Battles at the Bar* and more that of the life, struggles and personal philosophy of its author. For behind its accounts of forensic conflict there is dimly perceived a redoubtable fighter, disci-

plined lawyer and warm and human personality. One would like to know him better.

KENNETH S. CARLSTON
University of Illinois

DEMOCRACY AND DICTATORSHIP. *Their Psychology and Patterns of Life. By Zevedei Barbu. New York: Grove Press. 1956. $3.50. Pages 275.*

The author of this book, a Roumanian, lived under democracy up to 1938, Fascism from 1938 to 1944, and Communism from 1944 to 1948. He views the subject from the standpoint of psychology and sociology. Perhaps because of the reviewer's lack of proficiency in those disciplines, the book seems to be bogged down in abstract concepts and verbalisms, such as "adjustment", "structuration", and the description of Communism as a "culture-pattern" where "the dynamics of social life is conceived as rational concatenations of super-individual factors rather than as a system of inter-individual relationships" (page 247). Stripped of his typical terminology, the author's principal idea seems to be that a democratic society is flexible. People do not fear change, but welcome evolution and progress; such change ("social dynamism") can result from conscious creative activity of the members of the society themselves (pages 14-15). There is confidence in reason and deliberation; authority is delegated and decentralized (pages 18-20). Democracy is associated with security and prosperity (page 21). It produces and requires individuality, critical mind, objectivity and leisure (page 70). It permits and promotes independent values unconnected with the state: art, science, philosophy and religion are not treated as political instrumentalities and channeled into paths prescribed by the government (pages 82, 90). Tolerance of others and "cultural heterogeneity" also result (page 100).

Totalitarian society, on the other hand, is the result of tension, stress, insecurity and discontent (pages 81, 123). Hitler's appeal was to the disinherited and *déclassés* who failed "to integrate themselves with one of the institutionalized forms of their society" (page 129). Nazism was totally irrational; action as such (without purpose or values) was its watchword (pages 133-39). It resulted in the "identification of the individual with his group, which group in turn fails to integrate itself at an inter-group level. In other words Nazism implies the structuration of the group below the international level of integration which forms one of the distinctive notes of modern Western civilization" (page 149). That sentence, I believe, means that the Nazis did not recognize that there were other nations having rights that must be respected.

Communism likewise makes its appeal to outcasts, in times of stress, but under conditions "where the belief in reason and the cult of the masses are dominant traits". These pariahs over-rationalize and "oversocialize their anxiety for belongingness and integration" (pages 178, 188, 231). A Communist's "combativeness is socialized in an almost military manner; it is displayed, not at individual, but at group level". Combativeness and ruthlessness are the qualities prized in the Party (pages 192-93). Communism is "the total negation of Western civilization" (page 195). Its dogma defines truth as whatever is useful to the party; objective reality is disregarded (page 250). This philosophy somewhat resembles the pragmatism or instrumentalism of John Dewey. A Communist lives under the assumption that there is always an enemy present; suspicion and hostility are ingrained in his personality (page 242). Anxiety for change is also universal; "they are able to bear any strain and to work hard at any time if only they feel that the world is changing". (pages 243-44). They also need the comfort of working collectively in a group. The emotional symptoms of an ostracized Communist "are on the whole those of an infant separated from his mother". A disgraced Communist "is prepared to do anything in order to regain the favour of the Party, be that favour only a motherly look before he dies" (page 244). Personal emotion, friendship, love or lyric poetry have no place in the Communist scheme of things. "There is no object of love in Communist society except the Party and the objects it stands for" (page 252).

These traits "are characteristic of the type of personality developed under conditions of insecurity. Through its authoritarian rule, the Communist Parties maintain those conditions. One calls these traits pathological, for they are more frequently found in paranoid behavior. In fact, in a Communist way of life they are normal forms of adjustment. Their abnormality is apparent only from a democratic point of view" (page 263).

In other words, in a Communist society everyone is crazy. A person living there does not accept the Communist way of life as the result of fear or indoctrination, but as an unconscious natural reaction to the crazy world of tension and insecurity in which he lives (page 266).

The moral to be drawn from this book is that "it is the incapacity of modern society to integrate its members in its own structure that constitutes the first condition in the rise of contemporary totalitarian societies" (page 188). To combat Communism, therefore, it is vital to eliminate injustice, indigence, insecurity and similar conditions in which individuals or groups feel that they are unwanted, useless, of no importance or value to the society in which they live, and that they are without future or anything to hope for and to look forward to. In such conditions antidemocratic "isms" thrive.

EDWARD DUMBAULD
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THE CRIMINAL CODE OF JAPAN. *Translated by Thomas L. Blakemore. Rutland, Vermont, and*

Tokyo: Charles E. Tuttle Company. 1954. $3.50. Pages 192.

This is a revised edition (responsive to some amendment of the Criminal Code of 1953-54) of a work which since its first appearance in 1950 has superseded all older translations of the Code to become an indispensable *vade mecum* not only of the foreign practitioner, but of foreign businessmen and scholars in Japan as well. We may be grateful for this excellent English edition of the important criminal law; for his knowledge of other branches of the current law of Japan the foreigner, unless able to read the Japanese original, is for the most part remitted to wrestling with the translations produced by various organs of the Government, always something less than pellucid in expression and not infrequently unintelligible, even to a lawyer. The present edition of the Criminal Code contains not only an accurate, clear and readable translation, but also the complete Japanese text; like translations of others of the Six Codes by equally capable hands would be welcomed.

To the lawyer in America, also, if he has any interest in comparative law, this work will be of value. The penal law of Japan illustrates well enough the somewhat tortuous course followed by Japanese law since the adoption of Western legal concepts three quarters of a century ago, and its present condition. Having concluded that the adoption of a Western type of law was inevitable, the Japanese undertook a minute study of the legal systems of the Occident ranging from the Code Napoléon to the laws of Montenegro, from Germany to New York to India. Out of a comparative study of these disparate materials came, in 1880, a Criminal Code preponderantly French in orientation, though not without its own eclecticism. This first experiment in Western law gave place, after a decade or so of effectiveness, to the German-inspired Code which survives, substantially, to the present day.

Meanwhile—in the half-century that the Criminal Code has remained largely unaltered—stupendous events on the world stage have supervened, Japanese law and Japanese life have felt the impact of a great burgeoning of international trade and communication, of war and victory, of war and defeat—and of protracted occupation of the native soil by American forces. The influence of the Occupation on some fields of Japanese law has been direct and overwhelming—Japan today has a Constitution and a public law frankly within the American orbit; its Commercial Code has in progressive revisions, culminating in that of 1951, assumed more and more of the coloration of Anglo-American law; the Code of Criminal Procedure was wholly rewritten in the post-war years to incorporate American concepts of protection for the accused. The Criminal Code itself has not been subjected to any such wholesale infusion of American law; but by reason of its intimate relation to the Code of Criminal Procedure it has not been able to escape some infiltration, by a sort of osmotic process, of Anglo-American legal ideas from that Code, at least. While these ideas assume a more important place in the areas of judicial and professional thinking, of interpretation and application of the laws, than in the written provisions of the Code, enough is there to give to the American lawyer a view of some aspects of Japanese legal development in mid-century.

BEN BRUCE BLAKENEY

Tokyo

PROCEDURE AND PRACTICE BEFORE THE TAX COURT OF THE UNITED STATES, *15th Edition. Chicago: Commerce Clearing House, Inc. 1955. $4.00. Pages 280.*

This book does not purport to be a compendium of tax law. It does not answer the hundreds of questions of tax liability and nonliability which constantly arise to confound the taxpayer and his lawyer. It does, however, very clearly instruct the lawyer how to proceed in case he believes that a wrongful deficiency has been or is about to be asserted against his client.

It briefly outlines the structure of the Internal Revenue Service and its offices, and the conference procedure that may be followed before the deficiency is asserted and before it becomes necessary for the taxpayer to determine whether he will appeal to the Tax Court or pay the deficiency and sue for refund.

The step-by-step chart for procedure in the Tax Court and on appeal therefrom, with which the work starts, is a speedy guide and time-saver.

There are many lawyers who have never tried a case before the Tax Court. To any of those who decide to undertake the preparation and trial of a case in that court, this work is of inestimable value.

It is true that by a careful study of the rules of the Tax Court and reference to the various tax services it is possible to find all of the information that is contained in this book. The expenditure of time, however, in following that course would be very great. For the experienced tax lawyer as well, the book has many valuable suggestions and time-saving possibilities.

It outlines the procedure from the receipt of the deficiency through the Tax Court to the Court of Appeals and to the Supreme Court. Its great value is that it enables one at a glance to settle most of the petty problems which are entirely independent of the merits of the case—problems which depend merely on form, rules of court and customary procedure.

The book is not merely a restatement in concise form of the rules of the Tax Court. The explanations and citations of cases given in the text solve many of the technical questions that afflict one who enters any new field and that often arise to test the memory of even the most experienced.

Capsule expositions of substantive law are often misleading and at best

of little value. Such expositions of procedure, however, are very helpful.

The forms and samples of protests and pleadings, powers of attorney for various types of taxpayers, and notices of all kinds are time saving to anyone going through the mill for the first time.

The chapter dealing with the jurisdiction of the Tax Court, the discussion as to who may file the appeal in cases of dissolved corporations, death of the taxpayer, misdescription of the taxpayer in the deficiency notice, and many similar cases are helpfully discussed.

Much of the material dealing with the petition is taken directly from the rules but the text enlarges and clarifies.

The chapter on preparation for the hearing before the Tax Court contains helpful suggestions and emphasizes the large part which stipulated evidence plays in tax trials—a device which to a lesser extent is used in the pretrial procedure of the regular courts.

The book contains a handy review of the rules of evidence applicable in trials without a jury in the United States District Court of the District of Columbia, which rules govern the admission of evidence in the Tax Court.

In short, this book gathers together in very convenient ready-reference form the material which is necessary from a procedural point of view to enable the presentation of the taxpayer's case to the Internal Revenue Service, the Tax Court, the Court of Appeals and the Supreme Court; and enables the lawyer to concentrate on the merits of the case and escape the harassment of checking in a dozen places on trivial questions of form and procedure.

MORRISON SHAFROTH
Denver, Colorado

HENRY WATTERSON: RECONSTRUCTED REBEL. *By Joseph Frazier Wall. New York: Oxford University Press. 1956. $6.00. Pages xiii, 362.*

This is one book that carries its own review, the introduction from the gifted pen of that great Kentuckian, Alben W. Barkley.

Henry Watterson, says Dr. Wall, was a "vibrant personality . . . a publicist of great popularity". Few men of any age could match the notable friendships of Marse Henry, who knew every American President from John Quincy Adams, who died while Watterson was a member of the House and on the floor at the time, to Franklin D. Roosevelt—all save William Henry Harrison.

Watterson was born in Washington, D. C., the son of a Congressman and newspaperman, and he enjoyed a nation-wide influence, even in the field of President-making, despite the fact that he had only four years of formal education.

He served in and out of the Confederate army. His frail body and sight in only one eye actually rendered him unfit for military service. At 16, he took up journalism, and finally founded the *Louisville Journal* and merged it with the *Courier*. His editorials gave national distinction to his paper for half a century.

Watterson chose the right spot, Louisville, for his life's work. Here the internecine war left few scars. He had gallantly fought slavery and secession. In Louisville, he waged the good fight for rehabilitation of the South and for a reunited country. Politics were his forte, whether he opposed or championed—Greely, Tilden, Cleveland, Wilson. He hesitated not to oppose those he championed or vice versa—once for expediency.

His fight for Tilden provokes a classical description of the sordid Tilden-Hayes election contest. Dr. Wall's brief account is the best I have ever read.

Watterson's talents were by no means confined to newspaper work and politics. (He was chairman of the Democratic National Convention of 1876.) He was a popular lecturer: his most noteworthy lecture was on Lincoln, who was his favorite President. He won the Pulitzer Prize for editorials. He achieved the Legion of Honor and the Hall of Fame and was awarded several honorary degrees.

Watterson died, wintering in Florida, on the day after his fifty-sixth wedding anniversary, December 20, 1921.

When he retired as editor emeritus, in 1919, the *Courier-Journal*, "The Old Lady on the Corner" then controlled by Robert Worth Bingham, said:

> His personality will continue to be an inspiration to Courier-Journal workers; his accomplishments, a standard of achievement; his name, one to be praised and loved. He has passed his seventy-ninth birthday. May he pass many another milestone before the world loses him as a companion or letters are deprived of the magic of his pen!

Lawyers who love American history, politics and biography should read this charming book.

HERBERT U. FEIBELMAN
Miami, Florida

Review of Recent Supreme Court Decisions

George Rossman
EDITOR-in-CHARGE

Commerce . . . *shipment of explosives*

■ *United States* v. *Western Pacific Railroad,* 352 U.S. 59, 1 L. ed. 2d 126, 77 S. Ct. 161, 25 U. S. Law Week 4028. (No. 18, decided December 3, 1956.) *On writ of certiorari to the United States Court of Claims. Reversed and remanded.*

The basic question here was whether shipments by rail by the Army of napalm without fuses or burster charges should be paid for at the rate for shipment of incendiary bombs or at the lower rate for the shipment of gasoline in steel drums.

The napalm (gasoline thickened by the addition of aluminum soap powder) was shipped over the lines of the three carriers in steel casings without the burster charges and fuses necessary to complete the napalm bomb. In this condition, napalm is inflammable but not self-igniting. Respondents brought this suit in the Court of Claims to recover the difference between the two rates. The Government contended: (1) that the incendiary bomb rate was inapplicable because the absence of bursters and fuses deprived the bombs of the characteristics of "incendiary bombs"; (2) that if the higher tariff applied, it was unreasonable, and the proceedings should be suspended and the matter referred to the Interstate Commerce Commission and (3) in any event, two of the carriers were estopped from charging the higher rate.

The Court of Claims held that the shipments were bombs within the meaning of the tariff schedule, and, while recognizing the Government's right to have the defense of unreasonableness determined by the ICC, the court ruled that the right of referral to the Commission had been cut off by the two-year statute of limitations in Section 16 (3) of the Interstate Commerce Act. The court also overruled the defense of estoppel.

Mr. Justice HARLAN delivered the opinion of the Supreme Court reversing and remanding. Although neither side had questioned the Court of Claims' holding on this point, the Supreme Court applied the doctrine of primary jurisdiction, holding that the question of tariff construction as well as the question of the reasonableness of the tariff as applied to the bombs was within the exclusive primary jurisdiction of the ICC. The doctrine of primary jurisdiction applies, the Court declared, "where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issue to the administrative body for its views". A decision whether a certain item was intended to be covered by the tariff for incendiary bombs involves intimate knowledge of the complex problems of cost-allocation and safety precautions that led to setting the tariff initially, the Court said, and this was a problem for the Commission.

The Court held, moreover, that referral to the Commission was not barred by Section 16 (3) of the Interstate Commerce Act, since the Court of Claims Act permits the bringing of suits within six years after the accrual of a cause of action. To hold otherwise, the Court pointed out, would mean that the United States could be sued for six years, but could raise certain defenses for only two years. The Court found that Section 16 (3) deals with the filing of an affirmative suit before the Commission but not with the referral of questions to the Commission incident to judicial proceedings. The Court also overruled the Court of Appeals on the question of estoppel.

Mr. Justice DOUGLAS noted his dissent from a reference of the case to the Interstate Commerce Commission.

Mr. Justice REED and Mr. Justice BRENNAN took no part in the consideration or decision of the case.

The case was argued by Morton Hollander for petitioner and by Frederick Bernays Wiener for respondents.

Commerce . . . *rates*

■ *United States* v. *Chesapeake & Ohio Railway Company,* 352 U. S. 77, 1 L. ed. 2d 140, 77 S. Ct. 172, 25 U. S. Law Week 4033. (No. 19, decided December 3, 1956.) *On writ of certiorari to the United States Court of Appeals for the Fourth Circuit. Reversed and remanded.*

This case involved a question similar to that raised in No. 17, *supra.*

In 1941 and 1942, the Government shipped from Michigan to Newport News, Virginia, military supplies destined for China via Rangoon. On March 8, 1942, Rangoon fell to the Japanese, and the exportation was frustrated. The Government took possession of the supplies and later re-shipped them to Calcutta. If the goods had been shipped to Rangoon,

Reviews in this issue by Rowland Young.

the *export* rate would apply, which is lower than the domestic rate. This was a suit by the carrier to recover the difference between the export rate and the higher domestic rate.

The suit was brought under the Tucker Act in a federal district court, which awarded a judgment to the carrier. The Court of Appeals held that the domestic rate was the proper one and upheld the district court's denial of the Government's request to refer the question to the Interstate Commerce Commission, saying that no one questioned the reasonableness of the domestic rate, and that the question really was "which rate was applicable to the shipment under the circumstances of the case, a question which the court was competent to decide". The Court went on to hold that, in any event, the two-year statute of limitations in the Interstate Commerce Act barred referral to the Commission.

The Supreme Court reversed and remanded, again speaking through Mr. Justice HARLAN. The Court said that it could not determine whether or not there should have been a referral to the Commission. The Government did not question the Court of Appeals' ruling that the domestic tariff applied, the Court noted, but only argued that the tariff was unreasonable as applied to these particular shipments. "The parties, therefore, have not briefed or argued the factors making for or against the application of the domestic rather than the export tariff. Consequently, we do not know what kinds of factors are involved, and we therefore cannot say on this record whether the issue of tariff construction should have been referred to the Commission."

Accordingly, the Court remanded the case to the Court of Appeals for a determination of that question on the full record. The Court added that referral to the Interstate Commerce Commission was not barred by the statute of limitations of the Interstate Commerce Act, for the reasons given in No. 17.

Mr. Justice DOUGLAS noted his dissent from a reference of the matters to the Interstate Commerce Commission.

Mr. Justice REED and Mr. Justice BRENNAN took no part in the consideration or decision of the case.

The case was argued by Morton Hollander for petitioner and by Meade T. Spicer, Jr., for respondent.

Constitutional Law . . . *forfeiture for non-payment of taxes*

■ *Nelson* v. *City of New York*, 352 U. S. 103, 1 L. ed. 2d 271, 77 S. Ct. 195, 25 U. S. Law Week 4051. (No. 30, decided December 10, 1956.) *On appeal from the Court of Appeals of New York. Affirmed.*

This case sustained the validity of New York's admittedly "harsh" tax lien foreclosure statute.

Appellants were trustee-owners of two parcels of real estate in New York City. In 1950 and 1951, the City foreclosed its statutory lien for unpaid water charges after posting and publishing notice and mailing a copy of the notice to the last known address of the owner, pursuant to the terms of the statute. Appellants took no action during the redemption period, and foreclosure judgments were entered by default. One parcel, valued at $6,000, was foreclosed for the $65 in unpaid water charges; the other parcel, on which some $814.50 was due, was valued at $46,000. The City retained the proceeds of the sale in one case and in the other acquired title to the property and still retains it, refusing appellants' offer to pay with interest and penalties all amounts due the City. Appellants claimed that they received no actual notice of the foreclosure proceedings by reason of the fact that their bookkeeper concealed the notices and the non-payment of the water charges. The New York courts rejected appellants' attempt to set aside the City's deed and to recover the surplus proceeds from the sale of the property, an attempt made by way of a plenary action after they had offered to pay with interest and penalties all amounts owing on the two parcels.

The Supreme Court affirmed, speaking through the CHIEF JUSTICE. The Court found that the city had foreclosed "real property for charges four years delinquent and, in the absence of timely action to redeem or to recover any surplus, retain the property or the entire proceeds of its sale. We hold that nothing in the Federal Constitution prevents this where the record shows adequate steps were taken to notify the owner of the charges due and of the foreclosure proceedings." *Covey* v. *Town of Somers*, 351 U. S. 141, involving a counterpart of the statute in the present case, was distinguished on its facts. The Court admitted that the statute was harsh, but agreed with the New York Court of Appeals that relief from the hardship was the responsibility of the legislature. The Court noted that the New York legislature had in fact amended the statute in its latest session so as to permit reconveyance of property still held by the city upon payment of arrears, interest and the costs of foreclosure.

The case was argued by William P. Jones for appellants and by Seymour B. Quel for appellee.

Government bonds . . . *federal versus local law*

■ *Bank of America National Trust and Savings Association* v. *Parnell, Bank of America National Trust and Savings Association* v. *First National Bank in Indiana*, 352 U. S. 29, 1 L. ed. 2d 93, 77 S. Ct. 119, 25 U. S. Law Week 4009. (Nos. 21 and 22, decided November 13, 1956.) *On writs of certiorari to the United States Court of Appeals for the Third Circuit. Reversed and remanded.*

In this action for conversion of United States bonds, the question before the Supreme Court was whether federal or local law governed the rights of the parties and the burden of proof.

The bonds were bearer bonds with payment guaranteed by the United States, due to mature in 1952. The bonds were called in 1944, however, pursuant to their terms, and disappeared while petitioner was getting

them ready for payment. In 1948, the bonds were presented for payment to the First National Bank by Parnell, and the bank forwarded them to the Federal Reserve Bank of Cleveland which cashed them. The principal issue at the trial was whether the respondents took the bonds in good faith without knowledge or notice of the defect in title. The federal trial judge treated the case as an ordinary diversity case and followed state law, charging the jury that the burden of proof was on the respondents. The jury brought in verdicts for the petitioner.

The Court of Appeals reversed, ruling that, under *Clearfield Trust Co.* v. *United States,* 318 U. S. 363, federal law placed the burden on the petitioner to show notice and lack of good faith on the part of the respondents.

The Supreme Court reversed and remanded, speaking through Mr. Justice FRANKFURTER. The Court distinguished the *Clearfield Trust* case, which had held that federal law governed a suit by the United States to recover on an express guaranty of prior endorsements on a Government check with a forged endorsement. The rationale of the *Clearfield Trust* case had been that application of local law would subject the rights and duties of the Government to exceptional uncertainty, the Court said, but here the litigation was purely between private parties and did not touch the rights and duties of the Government. "The only possible interest of the United States . . ." the Court explained, "is that the floating of securities of the United States might somehow or other be adversely affected by the local rule of a particular State regarding the liability of a converter. This is far too speculative, far too remote a possibility to justify the application of federal law to transactions essentially of local concern."

The Court added that its decision did not mean that all litigation between private parties over Government paper was necessarily governed by local law.

Mr. Justice BLACK and Mr. Justice DOUGLAS dissented, arguing that the "federal law merchant" should be applicable to all transactions in the commercial paper of the United States in order to provide a "certain and definite guide" to the rights of all parties instead of subjecting them to the "vagaries of the law of many States".

The cases were argued by Erwin N. Griswold for petitioner, by Edward Dumbauld for respondent in No. 21 and by Harvey A. Miller, Jr., for respondent in No. 22.

Government employees . . . *holiday pay*

■ *United States* v. *Bergh,* 352 U. S. 40, 1 L. ed. 2d 102, 77 S. Ct. 106, 25 U. S. Law Week 4013. (No. 17, decided November 19, 1956.) *On writ of certiorari to the United States Court of Claims. Reversed.*

This was a suit by *per diem* employees of the Navy Department to recover an extra day's pay for each holiday worked in 1945.

The respondents had worked on certain holidays in 1945 and had been paid only the regular pay for such work. They contended that under a Joint Resolution passed by Congress in 1885, they had a vested right to an additional full day's pay as "gratuity pay" for each holiday worked. The Government argued either that the 1885 resolution had been repealed *in toto* by a 1938 joint resolution, or at least that the 1938 resolution was in conflict with the provisions of the 1885 resolution relied on by respondents.

The Court of Claims had entered judgment for the employees, relying upon *Kelly* v. *United States,* 119 Ct. Cl. 197, affirmed by the Supreme Court, 342 U. S. 193.

The Supreme Court reversed in an opinion written by Mr. Justice CLARK. The Court held that the *Kelly* decision was inapplicable, since it had been decided on the basis of the wage agreement present there.

Turning to the legislative history of the 1938 resolution, the Court found that it had been introduced after the President had excused all government employees from work on the day before Christmas in 1937. *Per diem* employees received no compensation for that day since December 24 was not one of the days specified in the 1885 resolution. The Court found that the 1938 resolution was drafted to cover the "general practice" of the Government as to holiday pay, and, as such, the Court found that it had repealed the 1885 resolution entirely. The purpose of the 1938 resolution, said the Court, "was to alleviate discriminations as to holiday pay and to treat employees alike insofar as possible. . . . Should the respondents' interpretation prevail it would result in a double standard of pay for per diem employees working on holidays. On those holidays included in the 1885 Resolution, the employees would receive double pay, while on holidays included in or created pursuant to the authority provided by the 1938 Resolution alone they would receive only single pay." The Court noted the Comptroller General had ruled that the 1938 resolution repealed the 1885 resolution and that efforts in Congress to pass legislation repealing this interpretation had failed; furthermore, the Court said, the 1940 and 1946 recodifications of the United States Code had both listed the 1885 resolution as repealed.

Mr. Justice BRENNAN took no part in the consideration or decision of the case.

Mr. Justice BURTON, joined by Mr. Justice BLACK and Mr. Justice FRANKFURTER, dissented in an opinion which interpreted the legislative history of the 1938 resolution as merely expanding the statutory list of holidays and eliminating a discrimination against *per diem* employees.

The case was argued by Alan S. Rosenthal for petitioner and by Herbert S. Thatcher for respondents.

Labor law . . . *false non-Communist affidavits.*

■ *Leedom* v. *International Union of Mine, Mill and Smelter Workers,*

352 U. S. 145, 1 L. ed. 2d 201, 77 S. Ct. 154, 25 U. S. Law Week 4042. (No. 57, decided December 10, 1956.) *On writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. Affirmed.*

Section 9 (h) of the National Labor Relations Act, 29 U. S. C. §159 (h), deprives labor unions of the services of the National Labor Relations Board unless each of the union officers has filed with the Board a non-Communist affidavit. The statute provides criminal penalties for filing a false affidavit. The question here was whether the criminal prosecution was the exclusive method of enforcing the non-Communist provisions or whether upon finding that an affidavit was false the Board could take administrative action and enter an order of decompliance with the provision and withhold its services.

The facts indicated that the union had continued to re-elect one of its officers in spite of the fact that his affidavit was false and the membership knew it. The Board held that the union was not in compliance with the act and ordered that the union be accorded no further benefits under the statute until it complied with the provision. The union brought this suit in the District Court seeking to enjoin the Board's order of "decompliance". The District Court denied the injunction, but the Court of Appeals reversed, holding that the false affidavit did not in any way alter the union's right to the benefits of the act.

Mr. Justice DOUGLAS affirmed, speaking for a unanimous Court. The Court rested its decision on the legislative history of Section 9 (h), noting that this very point had been considered by Congress, which had decided to leave the criminal penalty as the exclusive means of enforcing the provisions in order to avoid the possibility of "infinite delay" in the Board's certification proceedings while the Board investigated and determined Communist Party affiliation. The Court said that "the rule written in §9 (h) is for the protection of unions as well as for the detection of Communists."

The case was argued by Theophil Kammholz for petitioners and by Nathan Witt for respondent.

■ *Amalgamated Meat Cutters and Butcher Workmen of North America* v. *National Labor Relations Board*, 352 U. S. —, 1 L. ed. 2d 207, 77 S. Ct. 159, 25 U. S. Law Week 4045. (No. 40, decided December 10, 1956.) *On writ of certiorari to the United States Court of Appeals for the Sixth Circuit. Reversed.*

This was a companion case to No. 57, *supra*. In 1951, the union filed unfair labor practice charges against the Lannom Manufacturing Company. In February, 1952, when the National Labor Relations Board issued a complaint, Lannom sought to prove that some of the affidavits filed by union officers were false. The trial examiner ruled, and was later sustained by the Board, that that issue could not be litigated in the proceedings. The Board issued an order to correct Lannom's unfair labor practice. In August, 1953, one of the union officers was convicted for filing a false affidavit in 1950. The Board thereafter ordered the union to show cause why its compliance status under the act should not be altered, but the union re-elected the convicted officer. The Board then declared the union out of compliance. The District Court obtained an injunction enjoining the Board from altering the union's compliance status. This was affirmed by the Court of Appeals.

The Board petitioned the Court of Appeals for enforcement of the unfair labor practice order, but that court dismissed the petition on the ground that since the falsity of the affidavit had been proved, the act had not been complied with and no benefits should be accorded to the union.

Speaking through Mr. Justice DOUGLAS, the Supreme Court reversed, for the reasons stated in No. 57.

Mr. Justice FRANKFURTER wrote a brief concurring opinion which quoted with approval the dissenting opinion of Judge Stewart in the Court of Appeals. Judge Stewart had dissented on the ground that the officer's 1951 affidavit had not been proved to be false, and that there should be no presumption that he was guilty of a criminal offense in filing that affidavit.

The case was argued by Harold J. Cammer for petitioner, by Theophil C. Kammholz for respondent N.L.R.B. and by Judson Harwood for respondent Lannom.

Taxation . . . *subrogation*

■ *Putnam* v. *Commissioner of Internal Revenue*, 352 U. S. 82, 1 L. ed. 2d 144, 77 S. Ct. 175, 25 U. S. Law Week 4021. (No. 25, decided December 3, 1956.) *On writ of certiorari to the United States Court of Appeals for the Eighth Circuit. Affirmed.*

The question presented here was whether payment by the guarantor of a worthless note was fully deductible as an ordinary non-business loss, under Section 23 (e) (2) of the Internal Revenue Code, or whether it was deductible only as a bad debt, to be treated as a short-term capital loss under Section 23 (k) (4).

In 1945, Putnam, a lawyer, organized a company with two others to publish a labor newspaper. Putnam supplied the capital for the company and financed its operations for the short time it was in business. Just before the venture was abandoned, he acquired the stock of his fellow shareholders and wound up the company's affairs as sole stockholder. The assets of the company were insufficient to pay two notes given by the corporation and guaranteed by Putnam. The corporation was still in existence but had disposed of its assets when Putnam paid the notes. The Commissioner treated his loss as a non-business bad debt, and was sustained by the Tax Court and the Court of Appeals.

Mr. Justice BRENNAN spoke for the Court, affirming, writing his first opinion as a member of the Court. The Court reasoned that *instanter* upon payment by the guarantor of

a debt, the debtor's obligation to the creditor becomes an obligation to the guarantor by subrogation. "Thus" said the Court, "the loss sustained by the guarantor unable to recover from the debtor is by its very nature a loss from the worthlessness of a debt." The Court could find no justification for treating Putnam's loss under the general loss provision of Section 23 (e) (2). "Congress has legislated specially in the matter of deductions of nonbusiness bad debt losses, *i. e.*, such a loss is deductible only as a short-term capital loss" the Court declared. The Court found that the purpose of the Congress in enacting Section 23 (k) (4) supported its view of the case.

Mr. Justice HARLAN wrote a dissenting opinion which argued that, since the debtor was insolvent when the guarantor paid the note, it was unrealistic to treat his loss as the acquisition of a bad debt rather than the discharge of an obligation.

The case was argued by Richard E. Williams for petitioners and by Philip Elman for respondent.

Nominating Petitions

Connecticut

■ The undersigned hereby nominate Charles W. Pettengill, of Greenwich, for the office of State Delegate for and from Connecticut to be elected in 1957 for a three-year term beginning at the adjournment of the 1957 Annual Meeting:

Philo C. Calhoun, Charles R. Covert and Philip H. Smith, of Bridgeport;

Kenneth F. Clark, James A. Dougherty, Stewart H. Jones and Stanford Sutton, of Greenwich;

Lucius F. Robinson, Jr., Ernest W. McCormick, Cyril Coleman, Julius G. Day, Jr., James W. Carpenter, and John C. Parsons, of Hartford;

David H. Jacobs, of Meriden;

Richard H. Bowerman, William B. Gumbart, James W. Cooper and Herbert S. MacDonald, of New Haven;

Allyn L. Brown, Jr., Paul J. Driscoll and Charles W. Jewett, of Norwich;

George F. Lowman, Morgan P. Ames, Francis P. Schiaroli and Warren W. Eginton, of Stamford.

District of Columbia

■ The undersigned hereby nominate Francis W. Hill, of Washington, for the office of State Delegate for and from the District of Columbia to be elected in 1957 for a three-year term beginning at the adjournment of the 1957 Annual Meeting:

Charles S. Rhyne, Walter M. Bastian, H. C. Kilpatrick, W. Cameron Burton, Lowry N. Coe, Ashley Sellers, John W. Cragun, Bernard I. Nordlinger, Milton W. King, J. Edward Burroughs, Jr., Roger Robb, Kenneth Wells Parkinson, William T. Hannan, Joseph F. Castiello, John J. Wilson, Elizabeth M. Cox, Edmund L. Jones, Jo Morgan, John Lewis Smith, Jr., William B. Jones, Walter A. Slowinski, Edmund D. Campbell, Godfrey L. Munter, C. Oscar Berry and Richard W. Galiher, of Washington.

Illinois

■ The undersigned hereby nominate Benjamin Wham, of Chicago, for the office of State Delegate for and from the State of Illinois to be elected in 1957 for a three-year term beginning at the adjournment of the 1957 Annual Meeting:

Gilson Brown, of Alton;

Benedict W. Eovaldi, of Benton;

C. E. Feirich, of Carbondale;

Cushman B. Bissell, Richard H. Cain, James P. Carey, Jr., Andrew J. Dallstream, J. H. Hinshaw, Weymouth Kirkland, Homer J. Livingston, Abraham L. Marovitz, Holman D. Pettibone, Werner W. Schroeder, Jerome S. Weiss, John J. Yowell and Kenneth F. Burgess, of Chicago;

James S. Baldwin, of Decatur;

Henry C. Warner, of Dixon;

Henry F. Driemeyer, of East St. Louis;

Gordon Franklin, of Marion;

Clarence W. Heyl, of Peoria;

A. L. Yantis, of Shelbyville;

Paul W. Gordon, of Springfield;

Stanley B. Balbach, of Urbana;

Clarence W. Diver, of Waukegan.

Michigan

■ The undersigned hereby nominate Joseph Kadens, of Detroit, for the office of State Delegate for and from Michigan, to be elected in 1957 for a three-year term beginning at the adjournment of the 1957 Annual Meeting:

Clarence A. Reid, William B. Giles, Joseph J. Beck, Harold M. Shapero, Daniel L. Garan, Milton Lucow, Joel G. Jacob, Norman W. Feder, Richard Nahabedian, Harry Goodman, Herbert M. Eiges, John W. Keith, Harold S. Lynn, Stuart D. Hubbell, Abe A. Schmier, Stephen A. Bromberg, Hugh K. Davidson, George W. Trendle, Jr., Edward P. Simmet, Louis W. Snyder, Edgar Sells, John W. Piester, Roman S. Gribbs, Sheldon B. Krause and Walter A. Mansfield, of Detroit.

Michigan

■ The undersigned hereby nominate Henry L. Woolfenden, of Detroit, for the office of State Delegate for and from Michigan to be elected in 1957 for a three-year term beginning at the adjournment of the 1957 Annual Meeting:

William T. Gossett, of Dearborn;

George E. Brand, Thomas G. Long, Henry M. Hogan, Arthur F. Lederle, Glenn M. Coulter, Richard Ford, Charles H. King, Milo H. Crawford, Lester P. Dodd, William C. Allee, Frank H. Boss, Jr., Howard C. Baldwin, Thomas H. Adams, Louis F. Dahling, Walter A. Mansfield, Jason L. Honigman, Elizabeth

L. Stack and Ira W. Jayne, of Detroit;

Fred Roland Allaben, Gordon B. Wheeler, T. Gerald McShane, Richard W. Bryant and Gerald E. White, of Grand Rapids;

Selden S. Dickinson, of Grosse Pointe.

Virginia

■ The undersigned hereby nominate Lewis F. Powell, Jr., of Richmond, to fill the vacancy in the office of State Delegate for and from Virginia:

William A. Stuart, of Abingdon;

B. Drummond Ayres, of Accomac;

Armistead L. Boothe and James M. Thomson, of Alexandria;

Thomas W. Phillips and James H. Simmonds, of Arlington;

Waldo G. Miles, of Bristol;

John S. Battle, Jr., and F. D. G. Ribble, of Charlottesville;

Langhorne Jones, of Chatham;

Frank Talbott, Jr., of Danville;

Clayton E. Williams, of Lexington;

William Rosenberger, Jr., of Lynchburg;

Edward L. Breeden, Jr., Joseph L. Kelly, Jr., and James M. Robertson, of Norfolk;

Fred B. Greear, of Norton;

Howard C. Gilmer, Jr., of Pulaski;

A. Scott Anderson, David J. Mays and Melvin Wallinger, of Richmond;

Frank W. Rogers and Richard T. Edwards, of Roanoke;

William M. Tuck, of South Boston;

George M. Cochran, of Staunton.

Virginia

■ The undersigned hereby nominate William L. Zimmer III, of Richmond, to fill the vacancy in the office of State Delegate for and from Virginia:

George Damm, William J. Hassan, Ernest T. Gearheart, Jr., John J. Daly, Charles Stevens Russell and William L. Winston, of Arlington;

C. O'Conor Goolrick, James Ashby, Jr., Ralph M. Whitticar, Jr., William K. Goolrick, J. M. H. Willis, William B. Bolton, Duval Q. Hicks, Jr., and John D. Butzner, Jr., of Fredericksburg;

John C. Goddin, Calvin F. Major, Gordon H. Andrews, Garland M. Harwood, Jr., Richard D. Mattox, and Russell Alton Wright, of Richmond;

George S. Shackelford, Jr., Walter W. Wood, Murray A. Stoller, H. M. Moomaw and Fred B. Gentry, of Roanoke.

Notice By the Board of Elections

■ The following jurisdictions will elect a State Delegate for a three-year term beginning at the adjournment of the 1957 Annual Meeting and ending at the adjournment of the 1960 Annual Meeting:

Arizona	Nebraska
Connecticut	New Jersey
District of Columbia	Oklahoma
Illinois	Puerto Rico
Iowa	South Carolina
Maine	South Dakota
Michigan	Texas
Mississippi	Washington
Montana	Wyoming

An election will be held in the State of New Hampshire to fill the vacancy caused by the resignation of Louis E. Wyman, for the term expiring at the adjournment of the 1958 Annual Meeting.

An election will be held in the State of Virginia to fill the vacancy caused by the resignation of Stuart T. Saunders, for the term expiring at the adjournment of the 1959 Annual Meeting.

Nominating petitions for all State Delegates to be elected in 1957 must be filed with the Board of Elections not later than February 15, 1957. Petitions received too late for publication in the February issue of the JOURNAL (deadline for receipt January 4) cannot be published prior to distribution of ballots, which will take place on or about February 22, 1957.

Forms of nominating petitions may be obtained from the Headquarters of the American Bar Association, 1155 East 60th Street, Chicago 37, Illinois. Nominating petitions must be received at the Headquarters of the Association before the close of business at 5:00 P.M. February 15, 1957.

Attention is called to Section 5, Article VI of the Constitution, which provides:

> Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such state.

Only signatures of members in good standing will be counted. A member who is in default in the payment of dues for six months is not a member in good standing. Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers in the order in which they appear on the petition.

Special notice is hereby given that no more than twenty-five names of signers to any petition will be published.

Ballots will be mailed to the members in good standing accredited to the states in which elections are to be held within thirty days after the time for filing nominating petitions expires.

BOARD OF ELECTIONS
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What's New in the Law

The current product of courts, departments and agencies

George Rossman • EDITOR-IN-CHARGE
Richard B. Allen • ASSISTANT

Agency . . . *hospital nurses*

■ A nurse employed by a hospital is not the agent of the hospital when she is working under a doctor's instructions in an obstetrical delivery room. This is the decision of the Supreme Court of Vermont in holding that the hospital-employer is not liable under such circumstances for an injury caused to a patient by the nurse's application of pressure to the patient's ribs, undertaken at the direction of a doctor selected by the plaintiff and not employed by the hospital.

The Court said the essential question was: who has the right to control the offending servant in the performance of his work at the time in question? It held that when a nurse employed by a hospital is placed at the disposal of a physician or surgeon, such as in an operating or delivery room, the doctor becomes the master.

The Court concluded that the hospital was the general master but that the doctor was the special master under the circumstances. Therefore, it asserted, the hospital could not be liable for the alleged negligence of the nurse.

The case was one of first impression in Vermont, but courts in other jurisdictions have generally reached the same conclusion where actual control by a doctor, not employed by the hospital, has been shown.

(*Minogue* v. *Rutland Hospital, Inc.*, Supreme Court of Vermont, October 2, 1956, Adams, J., 125 A. 2d 796.)

Editor's Note: Virtually all the material mentioned in the above digests appears in the publications of the West Publishing Company or in The United States Law Week.

Communications Law . . . *telephone attachments*

■ Hush-A-Phone has taken on the United States Government and the combined American telephone industries and has won. The United States was represented in the fight by the Federal Communications Commission and the telephone industries by the twenty-one associated companies of the Bell system and by the United States Independent Telephone Association.

Hush-A-Phone is a cup-like gadget, on the market since 1921, which fits over the mouthpiece of a telephone. Its purpose is to confine the user's voice in the gadget, thus rendering his conversation private against other persons in the room, and to keep extraneous noise out of the telephone line, making the circuit quieter. In fact, absolute privacy is claimed if the user presses his face against the device, thus sealing his lips in the cup.

The telephone companies claimed that the use of Hush-A-Phone violated their tariffs, which forbid the attachment to a telephone of any device "not furnished by the telephone company". For several years they have asserted that Hush-A-Phone is a "foreign attachment" for the use of which they have the right to terminate service.

Feeling that this was an unwarranted interference with its business, Hush-A-Phone petitioned the FCC in 1948 to order the telephone companies to stop interfering with Hush-A-Phone and to amend their tariffs to permit its use. Hearings were held in 1950, and in 1951 the Commission released a preliminary opinion unfavorable to Hush-A-Phone. After further arguments, the Commission took the case under advisement for four years. Finally, in 1955, it ruled against Hush-A-Phone. It conceded that the device offered "significant" benefits of privacy and circuit-quietness, but ruled that it was a "public detriment" because its use resulted in some loss of intelligibility of telephone conversations.

But now the Court of Appeals for the District of Columbia Circuit has rescued Hush-A-Phone. In effect, the Court has held that it is a telephone user's own business if he wants to lose some hi-fi to gain privacy. The Court noted that the telephone companies admitted that a user might cup his hand over the mouthpiece to protect his conversation, and it could not see why the same result might not be obtained through a non-human device.

In the final analysis, the Court said, the question was whether the FCC "possesses enough control over the subscribers' use of his telephone to authorize the telephone company to prevent him from conversing in comparatively low and distorted tones". The answer, the Court continued, was that the companies' tariffs were unwarranted interferences with subscriber's rights, particularly since there was no discernible public detriment.

(*Hush-A-Phone Corporation* v. *U.S.*, United States Court of Appeals, District of Columbia Circuit, November 8, 1956, Bazelon, J.)

Copyright Law . . . *publication*

■ The distribution of 200 photographic copies of a "comprehensive rough dummy" of a traffic safety booklet to executives of casualty insurance companies, for the purpose of interesting one of them in buying the booklet for printing and distribution with his company's imprint, has been held by the Court of Appeals for the Second Circuit to be

a "publication" sufficient to clothe the work with copyright protection.

The copyright statute, 17 U.S.C.A. §10, provides that an author "may secure copyright for his work by publication thereof with the notice of copyright" appearing thereon in prescribed form. The booklet bore the required notation, but the defendants argued that there was no "publication" because the purpose of the distribution was limited.

The Court ruled that, while the distribution was for the specific purpose of finding a buyer, the persons to whom the distribution was made were not limited, because some of the booklets were placed on a table in a hotel where accident and casualty insurance companies were holding a convention and anyone could pocket one.

The Court remarked that "publication" might mean different things under different circumstances. Thus, it continued, "publication" necessary to obtain copyright under the statute did not have to be as extensive as "publication" to destroy the common-law property right retained by the author in a work for which no statutory copyright has been sought.

(*American Visuals Corporation* v. *Holland*, United States Court of Appeals, Second Circuit, November 20, 1956, Frank, J.)

Criminal Law . . . *insanity*

■ The Court of Appeals for the District of Columbia Circuit has explained that it did not intend to sweep away all vestiges of the criminal-insanity rule of *McNaghten's Case*, 8 Eng. Rep. 718, when it recently posited a new rule in *Durham* v. *U. S.*, 214 F. 2d 862.

McNaghten of course established the classic test of insanity as related to criminal responsibility: whether the defendant could tell right from wrong. In *Durham* the Court concluded that the advance of psychiatric knowledge demonstrated the fallacy of such a narrow approach and the Court adopted a rule that the inquiry should be whether the charged criminal conduct was the result or product of a diseased mind.

But in so doing, the Court asserted in the instant case, it did not purport to bar all use of the older tests. "[T]estimony given in their terms may still be received if the expert witness feels able to give it", the Court declared, "and where a proper evidential foundation is laid a trial court should permit the jury to consider such criteria in resolving the ultimate issue 'whether the accused acted because of a mental disorder.' In aid of such a determination the court may permit the jury to consider whether or not the accused understood the nature of what he was doing and whether or not his actions were due to a failure, because of mental disease or defect, properly to control his conduct."

The ultimate issue, the Court concluded, must, however, be defined to the jury in the terms of the *Durham* decision.

(*Douglas* v. *U.S.*, United States Court of Appeals, District of Columbia Circuit, November 9, 1956, Fahy, J.)

Criminal Law . . . *wire-tapping*

■ The Supreme Court of New Hampshire has refused to rule that evidence obtained by wire-tapping is inadmissible in a state criminal prosecution. The Court asserted that in the absence of a statute or of compelling constitutional reasons, it would stick to its 100-year-old rule that evidence secured through illegal search and seizure is admissible even though there are criminal and civil sanctions against those who obtain evidence in that manner.

The Court noted that wire-tapping has been a controversial subject in the courts and in legal writing for some time. It conceded that neither the majority rule that wire-tapped evidence is admissible, nor the minority and federal rule that it is not, is entirely satisfactory from the public's or defendant's viewpoint. It asserted that it was clear, however, since the Supreme Court's decision in *Schwartz* v. *Texas*, 344 U.S. 199, that the wire-tapping bar of §605 of the Communications Act does not require the exclusion of wire-tapped evidence in state courts. And, the Court pointed out, the Supreme Court has held that a state's admission of illegally-obtained evidence does not violate the Fourteenth Amendment.

The Court thought that the subject of wire-tapped evidence and its admissibility is a problem for legislatures to solve. The Court declared:

> . . . Whether wire-tapping should be allowed for certain serious crimes or not at all, whether wire-tapping if allowed should first be approved by the Attorney General or a judge or both, whether violators of wire-tapping should be liable in a civil suit for the violation of a right of privacy at a stated minimum of dollars and a host of other matters are questions which are obviously the province of legislative determination and regulation.

(*New Hampshire* v. *Tracey*, Supreme Court of New Hampshire, July 6, 1956, on rehearing August 14, 1956, Kenison, C. J., 125 A. 2d 774.)

Damages . . . *joint tort-feasors*

■ A first-impression interpretation of an issue raised under the Uniform Contribution Among Tort-feasors Act has been given by the Supreme Court of Pennsylvania.

The occasion for application of the legislation, enacted in Pennsylvania in 1951, was a three-car crossroads collision. In one car was Wilbert Daugherty, his wife, Elaine, their three children, Burdel, Leora and Rodney, and two other passengers, Gertrude and Carl D. Williams. All were injured and Carl died of his injuries. The other cars were driven by Mong and Hershberger.

Mong settled with all riders in the Daugherty car and took releases, in accordance with the act, providing that damages recoverable against all other tort-feasors would be reduced to the extent of Mong's pro rata share, or 50 per cent.

The seven Daugherty riders then sued Hershberger, who joined Mong as a defendant. All the plaintiffs recovered verdicts, but the total of them was less than the Mong settle-

ments. In some cases, the verdicts exceeded the settlements and in others the settlements were greater.

The act changes the common law by providing that a release of one joint tort-feasor does not discharge the others unless so stipulated. It then states that the release "reduces the claim against the other tort-feasors in the amount of the consideration paid for the release or in any amount or proportion by which the release provides that the total claim shall be reduced if greater than the consideration paid".

The plaintiffs claimed that under their releases they were entitled to recover from Hershberger one half of each of the verdicts, without regard to their settlements. But Hershberger contended that the act permitted a reduction of each verdict by the amounts of the settlements wherever that amount was greater than a one-half reduction would be.

The Court, with one judge dissenting, agreed with Hershberger. Reading what it termed the unambiguous language of the act and looking at the commissioners' notes in 9 U.L.A. 162, it ruled that "if the proportion of reduction provided by the release is greater than the amount of the consideration paid for the release, such proportion of reduction prevails, but if, on the other hand, the consideration paid for the release is greater than the proportion of reduction provided by the release, then the amount of the consideration paid for the release prevails".

Thus the picture terminated as shown in the table below.

(*Daugherty* v. *Hershberger*, Supreme Court of Pennsylvania, November 12, 1956. Stern, C. J., 126 A. 2d 730.)

	Mong's Settlements	Jury's Verdicts	Hershberger's Liability
Wilbert	$ 5,145.23	$ 5,559.49	$ 414.26
Elaine	779.77	2,000.00	1,000.00
Burdel	425.00	500.00	75.00
Leora	650.00	1,000.00	350.00
Rodney	1,000.00	500.00	0
Gertrude	1,500.00	1,161.50	0
Carl's Estate	4,000.00	1,000.00	0
TOTALS	13,500.00	11,720.99	1,839.26

Divorce . . .

cooling-off period

■ Illinois at last has a cooling-off-period divorce law that has stood a successful muster before the Supreme Court of that state.

A 1953 cooling-off-period statute was held unconstitutional by the Court in *People ex rel. Christiansen* v. *Connell*, 2 Ill. 2d 332 (40 A.B.A.J. 520; June, 1954). That legislation provided for the commencement of matrimonial actions by the filing of a "statement of intention" to file a suit. Sixty days had to elapse before a complaint could be filed and summons issued, and during that period the trial judge was required to request a voluntary conference of the parties. The act was condemned because it failed to accord litigants their constitutional right to immediate access to the courts and because it imposed nonjudicial duties on judges in violation of the separation-of-powers provisions.

In 1955 the Illinois legislature tried it again. This time the statute provided for the commencement of a matrimonial action by the filing of a request for summons, with immediate issuance of summons and service on the defendant. Sixty days must elapse, however, before a complaint may be filed or a decree entered.

The Court ruled that the 1955 statute successfully plugged the holes in the former act. The Court emphasized that the statute permitted immediate access to the courts by a procedural means applicable alike to all litigants. Since divorce is a non-common law action, the Court stated, reasonable post-jurisdictional delays may be imposed if not in conflict with constitutional provisions.

(*Illinois ex rel. Doty* v. *Connell*, Supreme Court of Illinois, September 25, 1956, rehearing denied November 19, 1956, Hershey, J., 9 Ill. 2d 390, 137 N.E. 2d 849.)

Food and Drug Law . . .

restitution

■ The Food and Drug Administration has failed in an attempt to have the Federal Food, Drug and Cosmetic Act interpreted to permit the entry of a decree requiring an erring manufacturer to make a nebulous restitution to the United States, in trust for persons who had purchased a sexual rejuvenation elixir found to be misbranded.

The Court of Appeals for the Ninth Circuit has affirmed a cease-and-desist consent decree against the misbranding, but has denied the Government's claim for restitution to purchasers.

The Court pointed out that the Act permits criminal prosecutions for violations, seizure of proscribed drugs in interstate commerce and restraining injunctions, but nothing further. It turned down the argument that the power to compel restitution was necessarily implied in order to promote the beneficent purposes of the Administration.

Also rejected was a contention that a court, exercising inherent equity jurisdiction and powers, could fashion a remedy to meet a situation, in this case restitution being the remedy. The Court asserted that under modern jurisprudence chancery does not issue new writs, but that such objectives are obtained through legislation.

The Court also noted that several technical problems stood in the way of the Administration's goal: no purchaser was a party, the Government did not sue as representative of any purchaser, and neither the number nor identity of pur-

chasers was alleged or proved.

(*U.S.* v. *Parkinson*, United States Court of Appeals, Ninth Circuit, November 21, 1956, Fee, J.)

Libel and Slander . . . *libel by TV*

■ Dissemination of defamatory remarks by television is libel rather than slander, according to the New York Supreme Court of New York County. The decision came on a motion to dismiss a multi-count complaint for insufficiency to state a cause of action for slander, and it is not clear whether the allegedly defamatory remarks were read from a script or were *ad lib*. The complaint did allege they were read from a prepared script or "notes".

The question was one of first impression in New York, and the Court could find no case precisely in point elsewhere. In New York, however, defamatory remarks broadcast by radio and actually read from a script were held to be libel in *Hartmann* v. *Winchell*, 296 N.Y. 296. But in that case the Court reserved the question of "whether broadcasting defamatory matter which has not been reduced to writing should be held to be libelous because of the potentially harmful and widespread effects of such defamation".

In the instant case, involving two well-known New York City restaurateurs—Toots Shor and Sherman Billingsley—the Court apparently takes the step left untaken in the *Hartmann* case. Citing many decisions and texts in the complex libel vs. slander field apropos modern communications media, the Court relied for its decision on the elements of widespread dissemination and permanency present in television broadcasting. A film of the broadcast in the instant case was made for later use.

The defendants contended that the application of the law of libel to broadcasting or telecasting without a script must be made, if at all, by legislation. This has been done in England by the Defamation Act of 1952. But the Court did not agree. It asserted that the essence of the common law is to provide a remedy for a wrong and that every action, when brought for the first time, must have been without precedent. The Court pointed out that courts have had no difficulty in applying the law of libel to motion pictures.

(*Shor* v. *Billingsley*, New York Supreme Court, New York County, November 28, 1956, Hecht, J.)

Negligence . . . *guest statute*

■ Reversing a guest-statute judgment, the Appellate Court of Indiana has held that it was not wanton and wilful misconduct for a host motorist to turn off the ignition to coast, although such action resulted in the steering mechanism locking so that the driver could not turn to avoid hitting a tree.

The evidence showed that the driver had coasted in this manner before and that the steering gears and front wheels had not locked, although he knew they were supposed to do so. He testified that he thought the mechanism was out of order and that he was surprised when the steering locked.

The Court accepted a definition of wanton and wilful misconduct that it is the intentional commission or omission of an act tending to show that the motorist should know that an injury to his guest will result therefrom. Applying this standard the Court asserted that the motorist was not guilty of wanton and wilful misconduct since he thought the locking mechanism would not work and that he did not therefore proceed "with reckless indifference to consequences in a course which he knew would probably result in injury" to the guest.

(*Sausaman* v. *Leininger*, Appellate Court of Indiana, October 15, 1956, Kendall, J., 137 N.E. 2d 547.)

Sales . . . *implied warranties*

■ Presented with a first-impression opportunity to adopt a rule, the Supreme Court of Nebraska has held that a restaurateur impliedly warrants what he serves as fit for human consumption and that he is liable on a breach of warranty theory as well as for negligence.

The plaintiff incurred mouth injuries when she bit down on a sliver of glass contained in sherbet she was served at the defendant's restaurant. Her complaint alleged both general negligence and breach of implied warranty. The trial court refused to instruct on the latter theory and, because the plaintiff's evidence was insufficient to support negligence, the jury returned a verdict for the defendant.

The Court, ruling that the trial judge's refusal to instruct on the breach of warranty theory was error, reversed and remanded. The Court noted that a minority of jurisdictions adhere to the "Connecticut-New Jersey rule" that a restaurant owner is not subject to the implied warranty doctrine, but it adopted the majority rule (the "Massachusetts-New York rule") that one engaged in the business of serving food for immediate consumption on the premises impliedly warrants that the food is wholesome and fit for human consumption and is liable upon a breach of warranty, without proof of negligence, to a customer injured by eating deleterious food.

(*Zorinsky* v. *American Legion, Omaha Post No. 1*, Supreme Court of Nebraska, November 9, 1956, Chappell, J., 79 N.W. 2d 172.)

State Governments . . . *debts*

■ A $10,000,000 revenue bond issue to provide new buildings at West Virginia University has been approved by the Supreme Court of Appeals of West Virginia against a challenge to its constitutionality.

To test the validity of the bond issue, which was authorized by the state legislature in 1956, it was contended that the issue violated a section of the state constitution prohibiting the state from contracting a debt.

The legislation provides that the principal and interest of the bonds are payable solely from revenues de-

rived from certain student fees at the university. For this reason, the Court held that a debt of the state was not created by the bond issue. It rejected an argument that a state debt was created because part of the funds allocated to amortization of the bonds had formerly been used for operating expenses of the university, and that with the diversion to amortization, additional revenues would have to be raised by taxation to replace the diverted funds.

(*West Virginia ex rel. Board of Governors* v. *O'Brien*, Supreme Court of Appeals of West Virginia, October 9, 1956, Given, J., 94 S.E. 2d 446.)

Taxation . . . *charitable exemptions*

■ The Court of Appeals for the Third Circuit has held that the Commissioner of Internal Revenue abused his discretion when he revoked in 1951 a charitable exemption granted a foundation in 1945, and claimed income taxes for several of the intervening years.

The Government's claims would have wiped out all the assets of the foundation. But the Court said this possibility did not control its decision, although it caused it to look twice at the Commissioner's action.

There is ample authority, the Court stated, for the Government to change retroactively a ruling of general application, but a dearth of authority as to individual taxpayer rulings, because such changes have almost invariably been prospective. "But it is quite a different matter", the Court declared, "to say that having once changed his mind the Commissioner may arbitrarily and without limit have the effect of that change go back over previous years during which the taxpayer operated under the previous ruling."

The Court conceded that a taxpayer might estop himself by not having relied on the ruling, or by not having relied on the ruling in good faith because of concealment of fact, fraud or misrepresentation. But it found none of these elements present in the instant case.

The Court also said that the Commissioner might revoke a ruling retroactively if the revocation was not arbitrary. But here it found the revocation not within the "bounds of permissible discretion".

(*The Lesavoy Foundation* v. *Commissioner*, United States Court of Appeals, Third Circuit, November 12, 1956, Goodrich, J.)

Taxation . . . *claim of right*

■ The Court of Appeals for the Seventh Circuit has applied the claim-of-right doctrine to contingent fees received by an attorney, though the lower court decision, under which the attorney's clients received a recovery, was later reversed and the clients ordered to refund the recovery.

The taxpayer contended that his receipt of the fees was erroneous because he was obligated to repay them after reversal of the judgment. Therefore, he said, it was proper for him not to have reported the fees as income.

But the Court, applying the language of the United States Supreme Court in *North American Oil Consolidated* v. *Burnet*, 286 U.S. 417, ruled that if a taxpayer receives earnings under a claim of right and without restriction as to disposition, he has reportable income even though he may not be able to retain it and may even be liable for its restoration. In the instant case the Court was somewhat influenced by the fact that the attorney had not returned the fees to his clients.

The taxpayer argued that the claim-of-right doctrine should not be applied because, as an attorney, he was under a fiduciary relationship with his clients and under an obligation to refund money improperly or erroneously received. But the Court could see no distinction. All persons, attorneys or not, are under a similar obligation, it remarked.

(*Phillips* v. *Commissioner*, United States Court of Appeals, Seventh Circuit, November 21, 1956, Major, J.)

United States . . . *foreign governments*

■ A happy souvenir vendor in Honolulu has his 3,827 simulated "Hapa Haneri" copper pennies back, thanks to some statutory interpretation and attention to history by the United States District Court for the District of Hawaii.

The "Hapa Haneri" is a copper penny issued by the Kingdom of Hawaii in 1847. An enterprising man had some similar coins made up to be sold as souvenirs. He ran afoul of 18 U.S.C.A. §489, which makes it unlawful to possess "any token, disk, or device in the likeness or similitude as to design, color, or the inscription thereon of any of the coins of the United States or of any foreign country issued as money . . ." The Government filed a libel for forfeiture of the coins.

The defense was that Hawaii is not a "foreign country" and that the statute means a presently existing "foreign country" or government. With this contention, the Court agreed. It took judicial notice of the historical background of the existence of Hawaii as an independent kingdom and of its annexation by the United States in 1898 and subsequent establishment as a territory in 1900. Thus, the Court asserted, the Kingdom of Hawaii, which had issued the original coins, "cannot possibly be considered as a 'foreign government' in the year 1956".

(*U.S.* v. *3,827 Coins*, United States District Court, District of Hawaii, October 3, 1956, Wiig, J., 144 F. Supp. 740.)

What's Happened Since . . .

■ On November 12, 1956, the Supreme Court of Pennsylvania affirmed *Estate of Stephen Girard* (41 A.B.A.J. 1041; November, 1955), leaving in effect the decision of the Orphans' Court of Philadelphia County that a provision in the will of Stephen Girard, restricting enrollment in Girard College to white students, does not violate Fourteenth Amendment rights of Negroes seeking to attend the institu-

(*Continued on page 172*)

Department of Legislation

Charles B. Nutting, Editor-in-Charge

■ Although the following article may, at first glance, appear to have little to do with legislation, it is actually a highly interesting case study of the legislative process. The author writes on the basis of intimate knowledge of the events he describes.

Judicial Reform in Illinois

by Rubin G. Cohn, Professor of Law, University of Illinois

■ The recent legislative history in Illinois of attempts to amend the antiquated judicial article of the state constitution provides a fascinating picture of the legislative process and of the interplay of contending political, public and professional forces.

Twice the organized Bar in Illinois has presented a proposal for comprehensive revision of the state's judicial structure and twice it has been rebuffed by the legislature. A third attempt will be made in the 70th General Assembly which convenes in January, 1957. In 1953, the proposal was adopted in the Senate, recommended for adoption by the House Executive Committee and ultimately tabled by the House after a vote on passage failed by a substantial margin to secure the necessary two-thirds approval of the entire House membership. In 1955, a modified but substantially similar proposal met even less success, being tabled by the Executive Committee of the House.

A brief history of the background of these proposals may be helpful in evaluating both the record of the past and the prospects for the future.

The need for constitutional reform of the judicial department of government in Illinois has long been recognized and conceded. In 1922, a constitutional convention proposed a wholesale revision of numerous articles of the Constitution, including sweeping substantive alterations in the judicial article. The entire proposal was defeated in a state referendum, but there is no evidence that the electorate was opposed to the provisions for judicial reform.

The Illinois Constitution, by reason of extremely restrictive amendment requirements, was virtually unamendable until the approval in 1950 of the so-called Gateway Amendment. With that amendment, however, impetus for constitutional reform of the judicial structure was re-invigorated. Early in 1951, the governing boards of the Chicago Bar Association and the Illinois State Bar Association created a joint committee to study the need for judicial reform and to draft a proposed constitutional amendment based upon its study. In the same year, the 67th Illinois General Assembly created an interim legislative commission to research and make recommendations in respect to the same subject.

The bar committee undertook an intensive study which was not finally terminated until shortly before the convening of the 68th General Assembly in 1953. It drafted a proposal which sought to accomplish the three following major objectives:

1. Reorganization of the entire judicial structure, with primary emphasis upon the creation of a single, unified trial court in each judicial circuit to supplant a conglomerate and multifarious system of independent trial courts of varied jurisdiction; the establishment of an independent intermediate appellate court; and the structural and jurisdictional reorganization of the Supreme Court.

2. The establishment in the Supreme Court of centralized administrative authority over the entire judicial system to be exercised through an administrative director and staff.

3. Adoption of the American Bar Association principles of non-partisan nominating commission procedures for the selection and tenure of judges in lieu of partisan adversary elections.

This draft was distributed to all members of the Bar for critical analysis and comment. It received the unanimous approval of the governing boards of both associations and thereafter was approved by a substantial majority of the members of each association in attendance at meetings at which the proposal was considered. Thereafter it was submitted to the interim commission of the General Assembly which apparently had determined not to undertake an independent research which might merely duplicate the bar committee's efforts. The legislative commission reviewed the Bar's draft with thoroughness and, working with the joint bar committee, sought to reconcile differences of opinion.

Long before the introduction of the Bar's proposal in the General Assembly on April 21, 1953, it became evident that the provisions for reorganization of the court structure and for centralizing administrative authority in the Supreme Court, with some exceptions, would be generally acceptable to the Bar and the legislature, but that the provisions relative to selection and tenure of judges would be bitterly controversial. To fortify its legislative standing in anticipation of a difficult fight, the joint committee secured the re-activation of a state-wide citizens' committee, comprised of widely known and respected professional, lay and religious leaders, and numerous civic and business groups.

The citizens' committee had supported the Gateway Amendment and had done a remarkably effective job in "selling" this proposal to the legis-

lature and the people of the state at large. It now pledged itself to the support of the Bar's proposal and undertook an intensive campaign in its behalf.

In the meantime the political battle lines were forming. Republican Governor William G. Stratton, then newly elected and facing his first legislative session, with his party in control of both houses, had, during his campaign and thereafter, supported generally the need for constitutional reform in the judicial department of government. Faced now with a specific proposal, he reaffirmed his support, but noted his reservations concerning the constitutional status of lawyers as participants in the appointive process.[1] Leadership in the Democratic Party, on the other hand, had already expressed its opposition to the proposed abolition of the partisan, elective system, asserting the "inalienable, God-given right of the people to elect their judges". Enlisting the support of labor leaders whose opposition stemmed from a fear that judicial appointees under the proposed system would be unsympathetic to labor, the Democratic Party stood firm on this issue. To further confound the issue, newspapers, almost without exception, supported the bar proposal, as did the judges of the Supreme Court, while many lawyers in a number of county bar associations opposed the selection and tenure provisions on grounds more emotional than rational.

The proposal passed its first legislative test in the Senate Executive Committee on May 27, 1953. By a vote on strictly partisan lines, the Republican-dominated committee recommended adoption of the proposed amendment. On June 2, the Senate passed the measure, securing the required two-thirds approval by a bare margin in which the vote again was on a purely partisan basis with one exception. The Governor's influence with his party at this point was clearly decisive, although it was evident that many who had voted for the proposal were somewhat less than enthusiastic about the selection and tenure provisions.

The Executive Committee of the House of Representatives received the measure on June 4 and on June 11 recommended its adoption. Again the vote was on partisan lines, with few exceptions. The decisive vote occurred on June 24 when, after bitter debate, the proposal was killed by a motion to postpone consideration indefinitely after an earlier unrecorded vote had shown that the measure lacked some thirty votes of the required two-thirds majority. Analysis of the voting record on this occasion revealed that the Governor did not exercise the strong influence over his party that had been demonstrated in the Senate. Some of the strongest opposition in debate and in the vote came from influential leaders in his party. The vote in favor of the measure, though predominately Republican, showed a measure of Democratic support but more significantly, major defections in Republican support. Although the coalition of political and labor opposition, reinforced by fragmentary though effective bar opposition, appeared to be the primary reason for the defeat of the proposal, it is more likely that the measure was the victim of a bi-partisan political compromise designed to accomplish another long-delayed constitutional objective, namely, reapportionment of the legislative branch of government.

The Constitution of Illinois had provided that the state be divided into fifty-one Senatorial Districts from each of which three House members and one Senate member were to be elected. Relative equality of population was the basis upon which the districts were to be legislatively established. The General Assembly was directed by the Constitution to reapportion the state every ten years. The last such reapportionment had occurred in 1901. Thereafter, the Assembly, predominately representative of downstate Illinois outside of Cook County, had steadfastly refused to reapportion. Had it done so, Cook County, containing the City of Chicago, would have legislative control of both branches of the legislature, a prospect viewed with great alarm by the political leaders in downstate Illinois and, in fact, by most of the state's population.

Governor Stratton had proposed a constitutional amendment re reapportionment which would give downstate Illinois control of the Senate and Cook County control of the House. Of all the measures in his legislative program, this was the one which he most desired to enact. His efforts in its behalf which at first had seemed certain of success became bogged down in the bitter political fight over judicial reform. Bipartisan support was imperative to secure the adoption of the reapportionment measure. To salvage reapportionment, judicial reform had to be sacrificed. The reapportionment resolution was adopted in both Houses by substantial majorities. Shortly thereafter the judicial proposal was defeated in the House. It seems fairly obvious that judicial reform was sacrificed to accomplish legislative reapportionment.

In 1955, the Joint Committee of the two bar associations determined to try again. Prior thereto, and after the adjournment of the 1953 General Assembly, the Committee had reviewed its proposal. Much of the opposition from the Democratic Party and from elements of the Bar relative to the 1953 proposal appeared to stem from a belief that that proposal gave too great a measure of power to the Governor in the appointment of judges and too much power to the organized Bar in the selection of the lawyer members of the nominating commissions. To eliminate these sources of opposition while at the same time preserving the basic principle of selection of judges through the commission

1. The Nominating Commission to fill vacancies in judicial office was to consist half of lawyers elected by members of the Bar in elections conducted under rules of the Supreme Court, and half of public members appointed by the Governor. The Commission's function was to recommend a panel of nominees from which the Governor was to make the appointment. The Governor's reservations were directed at the feasibility of giving to any professional group a constitutional sanction to engage in the process of making appointments to public office.

nominating method, the Joint Committee modified its draft in the following significant details.

1. Though retaining the power in the Governor to select the nonlawyer members of the nominating commission, the new proposal required that not more than one half of his appointees be of the same political party.

2. Appointment of the lawyer members of the nominating commission was to be made by the Supreme Court rather than by the members of the Bar.

3. The nominating commission was to select a single nominee to fill a judicial vacancy (in lieu of a panel of nominees from which the Governor was to make the appointment), and the nominee was then to be submitted to the voters of his district for acceptance or rejection before beginning his judicial service.

4. The controversial selective system was not to become effective until a subsequent state-wide referendum to be held two years after the adoption of the article.

5. The tenure provisions of the 1953 proposal which permitted judges to run for re-election on their records and without adversary candidates was extended to apply to the partisan elective system if the new appointive system was rejected by the people at the subsequent statewide referendum.

In all other substantive respects, the 1953 proposal was reaffirmed and approved by the Joint Committee. On March 8, 1955, the new proposal was introduced as House Joint Resolution No. 16. After a series of deferments, hearings were held late in May and early in June. Both major political parties had endorsed the need of judicial reform in general terms. Again the selection provisions became the center of controversy. Organized labor again offered its fears that the proposed selective system was dangerous to its legitimate aspirations. Governor Stratton, since 1953, had become increasingly disenchanted with the proposed selective system. Democratic Party leadership was also adamant in its opposition to the potential elimination of the adversary partisan elective system. Again some factions of the Bar were opposed to the plan. It became evident that the proposal was doomed unless compromise could be achieved. Governor Stratton proposed the retention of the elective system but in modified form. He suggested that all judges be elected in non-partisan elections with run-off elections between the candidates receiving the highest number of votes. The joint committee took no stand on this proposal other than to suggest to the governing boards of the two bar associations that it merited their consideration. Many members of the joint committee were opposed to the suggestion believing that it would lead to retrogression rather than improvement in the method of selecting judges.

In the meantime, a new element of political opposition was developing. This centered about the integration of the Municipal Court of Chicago into the Circuit Court of Cook County. The Democratic Party has long had complete control over the selection of judges of its Municipal Court. Elections for this court are held only in the City of Chicago. The Democratic Party has been virtually supreme in Chicago for a quarter of a century. The political complexion of Cook County, however, outside of the City of Chicago, has been undergoing transformation, and Republican Party strength in that area, coupled with its minority vote in Chicago, has fairly well equalized the political status of both parties for county-wide offices. Integration of the Municipal Court of Chicago into the Circuit Court of Cook County could well result in a loss of political strength of the Democratic Party in Chicago and Cook County. It was not to be expected that the leadership of the Democratic Party would view with equanimity this threat to its political supremacy.

In addition to these factors, the 1955 General Assembly was embroiled for months in developing the legislative reapportionment act made necessary by the adoption by the people of the constitutional amendment. Many members of that Assembly were fighting for their political lives as the boundaries of the new legislative districts were being drawn. Bitterness, tension and friction were the inevitable by-products of this fight. The legislative atmosphere was hardly conducive to agreement on judicial reform.

With this total background weighing heavily in the picture, the House Executive Committee, on June 10, 1955, reported House Joint Resolution No. 16 without recommendation. On June 13, the Resolution was tabled by the Committee, on a close vote, thus ending the fight for that session without the measure ever reaching the floor of the House.

The Joint Committee of the two bar associations has again evaluated its proposals. It is returning to the General Assembly in 1957 with only one significant change in its 1955 draft. It has recognized that the political implications of the integration of the Municipal Court of Chicago cannot be ignored. It is proposing, therefore, that in Cook County, the City of Chicago and the area outside the city shall be separate units for the selection of judges of the Circuit Court of Cook County. In doing so, the committee is making no concession to principle. The integrated court structure will be retained and, in providing for the selection of judges on the basis of separate geographic units in Cook County, the draft gives recognition to proper home rule objectives. In fact this provision is wholly consistent with the plan for downstate multiple-county judicial circuits wherein it is provided that each county shall have at least one associate judge of the circuit court who shall be selected from that county for judicial service in the county.

It is difficult to assess the prospects for passage of this proposal in the 1957 session of the General Assembly. Governor Stratton has again publicly declared his support for constitutional reform of the judicial article, but it is not known whether

this means support of the joint committee draft in all its phases. On the other hand, the platform of the Democratic Party for the first time expressly and unequivocally rejects any proposal for the abolition of the adversary elective system, though pledging support for judicial reform in general. Again the battle lines are forming and again new complications may arise. The 1957 General Assembly, as a result of the new reapportionment, will be materially altered in size, political complexion and geographic representation. Cook County has nominal control of the House and downstate Illinois has substantial control of the Senate. Within these groupings, internal divisions and political alignments are not yet crystallized.

Throughout, however, the joint committee has remained firm in its stand that improvement in judicial selection is the cornerstone of any reform in the system of judicial administration. It has not yielded to pressures to abandon this phase of the program in order to secure the other objectives. It does not deem its function to include compromise of basic objectives. This is a political function and responsibility. The committee cannot in good faith bargain away what it believes to be indispensable. If the leadership of the political parties is inclined to compromise, the responsibility for this action must be assumed by them, and not the joint committee.

Activities of Sections

SECTION OF ADMINISTRATIVE LAW

■ The midyear meeting of the Council of the Administrative Law Section will be held on Saturday and Sunday, February 16 and 17, 1957, at the Edgewater Beach Hotel, Chicago, Illinois. The meeting will start with a luncheon at 12:30 P.M. on Saturday, with meetings Saturday afternoon, Sunday morning and perhaps Sunday afternoon, with a luncheon also at 12:30 P.M. on Sunday.

Two resolutions approved by the Administrative Law Section at the Dallas meeting will be presented to the House of Delegates for its approval at the Midyear Meeting in February.

One of the resolutions deals with statutory and administrative restrictions on practitioners' fees before governmental agencies. An exhaustive survey of this subject was made by the Section's Committee on Administrative Practitioners which culminated in a thorough and painstaking Committee report (8 Ad. L. Bull. 137 *et seq.*) This report was made in response to a request of the Board of Governors at its October, 1955, meeting that the Administrative Law Section study statutory and administrative limitations on attorneys' fees. The Section, however, had been concerned previously with this problem and, at its annual meeting in Chicago in 1954, had adopted a resolution recommending that the House of Delegates authorize the Section of Administrative Law to advance appropriate legislation for the repeal of statutory provisions placing arbitrary or unreasonable limitations on fees for legal services rendered before administrative agencies. The Council later decided to postpone presentation of the resolution to the House of Delegates pending determination of certain questions.

In the development of the 1956 committee report, a questionnaire was sent to governmental agencies requesting information concerning restrictions placed on fees which could be collected by attorneys. The information thus developed clearly indicated that unreasonable and arbitrary fees regulations exist. A substitute resolution bringing the 1954 resolution up to date was adopted at the Dallas meeting in 1956. This latter resolution is the one which will be presented to the House of Delegates at the 1957 Midyear Meeting.

The other resolution which will be presented to the House of Delegates for approval requests Section authority to support legislation which would authorize the abbreviation of the record on the review or enforcement of orders of administrative agencies by the Courts of Appeals and to make uniform the law relating thereto.

SECTION OF JUDICIAL ADMINISTRATION

■ Justice Elwyn Thomas of the Supreme Court of Florida, Chairman of the Section of Judicial Administration, announces that wide distribution has been made of the Survey of the Trial Courts in Los Angeles County which has been made by a professional staff under the direction of Professor James G. Holbrook of the Southern California School of Law. This Survey was financed by an $80,000 grant from the John Randolph Haynes and Dora Haynes Foundation of Los Angeles and was carried out under the auspices of the Section of Judicial Administration's Committee on Metropolitan Trial Courts. Judge Ira W. Jayne, of Detroit, is chairman of the committee, and Judge Philbrick McCoy, of the Superior Court of Los Angeles, a member of Judge Jayne's committee and a vice chairman of the Section of Judicial Administration, served as vice chairman of an advisory committee of sixteen California judges, attorneys and citizens who assisted with the Survey.

The report makes sixteen major and twenty-six minor recommendations to improve the structure and operation of trial courts in Los Angeles County. These range from suggestions on the location and limitation of expansion of branch courts to the appointment and election of judges, a compulsory retirement age

for judges and recommendations that fewer jurors be required in civil cases.

Chief Justice Earl Warren wrote the foreword to the Survey and stated that it should challenge the interest of every citizen of Los Angeles County as well as of its 8,000 lawyers because it vitally affects the welfare of each of them. He pointed out that the reader might study it with confidence that he is not being misled either by propaganda or careless statements. He stated the report is not sensational because it deals with conditions and their underlying facts—not with personalities or individual deficiencies. He pays tribute to the vision, ingenuity and energy which have enabled the courts of Los Angeles County to keep abreast of the tremendous growth which that area has experienced in the last few years and states that he is happy that in his native state the Bench and Bar of the largest metropolitan county are honestly facing up to their problems and showing a willingness to share them with the people.

This is another in the surveys of Metropolitan Trial Courts carried on under the auspices of the Section of Judicial Administration. The first of them was made in Detroit from 1948 to 1950 by the University of Michigan Law School.

A cloth bound edition of the Survey may be obtained at a cost of $4.00, plus 20 cents mailing charge, (in California please add 16 cents for sales tax) from The Haynes Foundation, 607 South Hill Street, Los Angeles 14, California.

1957 Essay Contest To Be Conducted by the AMERICAN BAR ASSOCIATION

Pursuant to the terms of the bequest of Judge Erskine M. Ross, deceased.

INFORMATION FOR CONTESTANTS

Time When Essay Must Be Submitted: On or before April 1, 1957.

Amount of Prize: Two Thousand Seven Hundred Fifty Dollars.

Subject To Be Discussed:

"The Impact of Federal Subsidies on State Functions."

Eligibility:

The contest will be open to all members of the Association in good standing, including new members elected prior to March 1, 1957 (except previous winners, members of the Board of Governors, officers and employees of the Association), who have paid their annual dues to the Association for the current fiscal year in which the essay is to be submitted.

No essay will be accepted unless prepared for this contest and not previously published. Each entryman will be required to assign to the Association all right, title and interest in the essay submitted.

Instructions:

All necessary instructions and complete information with respect to number of words, numbers of copies, footnotes, citations, and means of identification, may be secured upon request to the

ROSS ESSAY CONTEST

AMERICAN BAR ASSOCIATION

1155 East Sixtieth Street Chicago 37, Illinois

Tax Notes

■ **Prepared by Committee on Publications, Section of Taxation, George D. Webster, Chairman.**

Effect of State Court Decrees in Federal Tax Litigation

Alvin E. Moscowitz, Saugerties, New York

■ In *Gallagher* v. *Smith*, 223 F. 2d 218 (3d Cir. 1955), the Third Circuit made a noble effort to clarify the effect to be given a state court decree, a question which the courts have found exceedingly difficult to answer in federal tax controversies.

In the *Gallagher* case, the decedent's will created a spendthrift trust giving the income to his wife for life. Six years after his death, the wife disclaimed 12/13 of her interest in the income. A Pennsylvania state court proceeding in which all parties joined approved the trustee's account and awarded the balance of the income to the decedent's twelve children who were the remaindermen under the trust. The question was whether the decree of the state court was binding as to the rights to income in the determination of federal tax liability.

The general Pennsylvania rule appeared to be that an assignment by a beneficiary of income payable to him under the terms of a spendthrift trust was revocable at any time. The judge writing the opinion for the Third Circuit concluded that the effect of the Pennsylvania state court decision was to determine conclusively that the wife had only a one-thirteenth interest in the income. The judge considered that since the wife was a party, she was bound by the decision, and the effect of the state court decision was to hold the disclaimer to be valid and effective. The judge rejected the Government's contention that the state court had clearly erred in applying the Pennsylvania law; the federal courts could not review the state court's decision which had long since become final, and even if wrong it could only have been corrected by an appeal which was not taken. The judge concluded that as matters stood, the state court decision adjudicated property rights conclusively and thus governed the tax consequences which depended wholly on such property rights.

The judge writing the opinion, a concurring judge, and the dissenting judge all agreed that the question of the right to income was one determinable by reference to state law and that if the state court decree were a proper adjudication of state property rights it would be binding on the Commissioner. There was disagreement, however, on whether the state court decree was one which met other tests of conclusiveness. The crucial question in the eyes of the district court and the Government was whether the proceeding was adversary. The circuit court judges, however, were more accurately concerned with the broader question whether there had been an "adjudication" and whether the proceeding was "collusive" in the tax sense.

The divergent views taken by the courts in the many cases involving state court decrees can only be reconciled by keeping the factors bearing on the whole subject of conclusiveness in their proper perspective; it must also be borne in mind that the proper function of the state court decision is to establish what the state law is. The basic tests would appear to be:

(a) that state law was relevant,

(b) that the issue involved property rights,

(c) that the state court had jurisdiction over the parties and subject matter,

(d) that the decision was an "adjudication" that was final and conclusive under state law of the rights of the parties, and

(e) that there was no "collusion" in the tax sense.

It will be noted that the nonadversary character of the proceeding, complained of by the Government, is not listed above as a basic factor. Placed in its proper perspective, this is but one factor along with tax motivation, consent decrees, and the conduct of the proceeding before the state court which bears on the issue of collusiveness. It is relevant, but not determinative of that specific issue, and hence it cannot, standing alone, be determinative of the larger issue of the conclusiveness of the state court decree. Those cases which have rejected the conclusiveness of a state court decision on the grounds of the "consent" nature of the decree or the "nonadversary character" of the proceeding indicate that these factors either (a) co-existed with other factors relevant to the issue of collusion, or (b) were present in cases where for other reasons the state court decree fell short of one or more of the basic tests outlined above.

As the court in the *Gallagher* case pointed out, in many of such cases the real basis for decision is that state law was not relevant because the issue before the federal court involved a statute in which federal criteria were imposed. Thus, state court decrees cannot establish whether a transfer for federal tax purposes has been made for an "adequate and full consideration in money or money's worth", or whether a transfer *inter vivos* is of the type in which federal criteria predominate, or whether business expenses are "ordinary and necessary", or whether income is subject to the taxpayer's "unfettered command". Those state court decisions could,

with equal propriety, be rejected as not constituting an "adjudication" of the precise point upon which state law was relevant.

In other cases in which the consent nature of the decree or the non-adversary character of the proceedings was singled out as significant it can be demonstrated that property rights were not adjudicated but were merely a characterization of such rights. Where for example, the financial results (other than tax-wise) to the parties in the state court would be the same, regardless of the outcome, there is no real issue affecting property rights. See *Estate of Sweet* v. *Commissioner*, 234 F. 2d 401 (10th Cir. 1956); *Newman* v. *Commissioner*, 222 F. 2d 131 (9th Cir. 1955); *Wolfsen* v. *Smyth*, 223 F. 2d 111 (9th Cir. 1955); *Tatem Wofford*, 5 T. C. 1152 (1945).

Thus, in the *Sweet* case the decedent had created a revocable *inter vivos* trust giving his wife a life interest in the income and the remainder to his children. Later in 1948 he executed a "Supplemental Trust Agreement" providing that the wife should have a general power of appointment over so much of the remainder of the original trust as should equal one half his adjusted gross estate. On his death, the Commissioner disallowed the marital deduction on the ground that the power of appointment did not extend to the entire corpus of the trust. (See *Estate of Louis B. Hoffenberg*, 22 T. C. 1185 (1954)).

The executors thereupon immediately filed a petition in the state court to construe the two trust instruments. The state court held that the "Supplemental Trust Agreement" created a new and separate trust. The estate thereupon contested the estate tax deficiency in the Tax Court on the ground that the wife had the power to appoint the entire corpus of the second trust which was separate and distinct from the first as established by the state court decree.

The Tax Court held for the Commissioner (24 T. C. 488 (1955)), and the Tenth Circuit affirmed. The Tenth Circuit held that the state court decree was not binding because it had been entered in a non-adversary proceeding, and "the decree was obtained by collusion for the purpose of maintaining the claim for marital deduction". The better explanation was perhaps that the state court did not essentially decide any question of property rights; the only substantial result which the decision could have had, if given effect, was to characterize the property rights so as to affect the federal estate tax consequences.

In still other cases, the non-adversary character of the proceeding is evidence of no "adjudication" in the sense that the decision doesn't purport to adjudge what the state law is. When, for example, a state court gratuitously makes some comment on the character of rights not in issue (*see Estate of Allen Clyde Street*, 25 T. C. 673 (1956)), or expressly refrains from considering an issue, (see *Commissioner* v. *Estate of Childs*, 147 F. 2d 368 (3d Cir. 1945)), the lack of any contest bears on whether there has been an "adjudication". This was the position of the dissent in the *Gallagher* case. The theory that a consideration of the merits is not required in every case, while correct enough as a general proposition, must be applied with care. It has relevance when other factors indicate that despite the lack of consideration of the issues by the court, it did purport to decide the precise question presented in the tax controversy. This would be true for example where a decree gives effect to a bona fide compromise of a disputed claim. See *Bullard* v. *Commissioner*, 90 F. 2d 144 (7th Cir. 1937), aff'd on this issue but rev'd on other grounds, 303 U. S. 297. See also proposed regulations, 26 CFR (1954) Part 20 §20.2053-1 (b) (2).

That the consent nature of a decree or the non-adversary character of a proceeding is not of itself determinative is borne out by numerous cases in which conclusive effect is given to a decree despite the presence of such factors. See *Blair* v. *Commissioner*, 300 U. S. 5 (1937); *Eisenmenger* v. *Commissioner*, 145 F. 2d 103 (8th Cir. 1944). Examination of such cases will reveal that other factors outweighed the non-adversary character of the proceeding on the issue of collusion and that the other basic factors outlined above were all met.

If the foregoing analysis is applied to other factors bearing on the issue of collusion, such as tax motivation, the same conclusion would be reached, namely, that it is but one factor relevant on the issue of collusion but not in and of itself determinative of the larger question of the binding effect of a state court decision.

What's New in the Law

(Continued from page 165)

tion. The Court held the trust operating the college was private, despite the fact that it is administered by the City of Philadelphia, and that the restriction to white students therefore did not result from state action.

■ On December 10, 1956, the Supreme Court of the United States:

AFFIRMED (unanimously, with opinion by MR. CHIEF JUSTICE WARREN) the decision of the Court of Appeals of New York in *City of New York* v. *Nelson*, 309 N.Y. 94, 127 N.E. 2d 827 (41 A.B.A.J. 958; October, 1955), that the application of a provision of the New York City Administrative Code, under which the city foreclosed liens for unpaid water charges, did not violate the Fourteenth Amendment. By application of the statute the city acquired real estate assessed at $52,000, against which there were foreclosable water arrears liens of about $887.

OUR YOUNGER LAWYERS

Kirk McAlpin, Secretary and Editor-in-Charge, Savannah, Georgia

■ The rapid growth of the Junior Bar Conference has crystalized the apparent need for improving and implementing its organizational structure.

The urgency of reviewing the general organization of the Conference and adapting it to meet today's needs to insure that the entire membership is more adequately represented and integrated into the Conference's workings prompted Chairman Farrer to appoint a special Committee on Reorganization, composed of Robert R. Richardson, of Atlanta, Executive Council Representative from the Fifth Circuit to serve as Chairman, and as members, Robert G. Storey, Jr., of Dallas, Past Chairman and *ex officio* Council member; James M. Ballengee, of Charleston, West Virginia, Fourth Circuit Council Representative; Arthur M. Lewis, of Hartford, Connecticut, Second Circuit Council Representative; F. William McCalpin, of St. Louis, Fifth and Eighth Circuits Council Representative at Large; and Bryce M. Fisher, of Cedar Rapids, Iowa, Eighth Circuit Council Representative.

This Committee was appointed immediately after the Dallas meeting and went into action at once, studying the present needs, exchanging suggestions and formulating proposed revisions. After extensive advance preparation, the Committee met at the American Bar Center in Chicago on October 22, 1956, with all members present. The ten major points which had been serving as the nucleus of consideration by the Committee in its correspondence and deliberations, and which formed the agenda for the Chicago meeting, included: (1) Creation of a new body within the J.B.C. structure; (2) Organization and function of such a body; (3) Changes in the Executive Council; (4) Selection of Nominating Committee; (5) Duties and Procedure of Nominating Committee; (6) Elections; (7) Automatic Succession of Chairman-Elect; (8) Fiscal Year; (9) Liaison with American Bar Association; and (10) Budget and Finances.

The Committee has formulated its recommendations, which will be presented to the Executive Council at the Midyear Meeting for its appropriate action.

Milwaukee Junior Bar Association

The Milwaukee Junior Bar Association, of which Thomas N. Tuttle is President, celebrated its twentieth anniversary on November 28, 1956, with a smoker at the Milwaukee Athletic Club. In addition to the members, guests included county and city department heads and county judges from the entire State of Wisconsin, who were attending a convention in Milwaukee on the same date. Harry P. Cain, a former Senator from the State of Washington, spoke on "Aspects of the Federal Loyalty-Security Program".

A feature of the annual program always looked forward to by members and guests was the skit presented by the Junior Bar Little Theatre Group, entitled "Highlights of the Past" and "Low Lights of Politics", musical sketches lampooning the various Milwaukee courts and the recent district attorney campaign. Another attraction was the Badger Lads, a championship quartet of the Society for the Preservation and Encouragement of Barbershop Quartet Singing in America.

New State Chairmen Take Office

Among the State Chairmen who took office during the last few months of 1956 are William J. Schoonmaker, Albany, New York; Ernest S. Wilson, Jr., Wilmington, Delaware; H. G. Shaffer, Jr., Madison, West Virginia; George J. Freeman, Mt. Clemens, Michigan; C. Severin Buschmann, Jr., Indianapolis, Indiana; Louis D. Gage, Jr., Janesville, Wisconsin; Edmund D. McEachen, Omaha, Nebraska; Harry M. Pippin, Williston, North Dakota; Joseph M. Butler, Rapid City, South Dakota; C. Robert Simpson, Jr., Los Angeles, California; Jack Verne Temple, Denver, Colorado; C. Clement Koogler, Aztec, New Mexico; Jack D. Jones, Tulsa, Oklahoma; and E. E. Lonabaugh, Sheridan, Wyoming.

Indiana Junior Bar Arranges Group Trip to London

The Indiana Junior Bar has worked out a practical and unique plan for augmenting attendance at the London American Bar Association Meeting, by chartering planes at a marked saving and making group hotel and travel accommodations available.

State Chairman C. Severin Buschmann, Jr., of Indianapolis, has appointed W. H. White, of Muncie, chairman of arrangements to make this plan a reality, and, as a result of considerable advance deliberation by both, this has been accomplished.

Two flights of 118 passenger Super Constellations (one leaving July 1 and returning July 30, and the other leaving July 15 and returning July 31) were chartered, and an offer extended to lawyers in Illinois and Wisconsin, who had indicated a desire to join in the venture. By arranging all hotel accommodations through a travel agent, reservations are definitely assured for all participants in the plan. Sight-seeing trips through England and on the Continent are being arranged to meet individual wishes, and all travel and hotel reservations will be handled by the travel agent.

The Indiana Junior Bar will try to accommodate lawyers from other

sections who wish to avail themselves of this opportunity. In such cases, reservations will be made on a "first come, first served" basis until seating capacity is exhausted; tickets must be paid for at the time reservations are placed. If you are interested, additional information may be obtained from Bar Association Trip, Muncie Travel Service, 120 East Main Street, Muncie, Indiana.

Junior Bar of Colorado

The Junior Bar Section of the Colorado Bar Association, with Jack Vern Temple of Denver as chairman, has undertaken several worthwhile projects.

Of these, one of the most important is the campaign and survey being undertaken by the Committee on Justice Courts and Police Magistrate Courts, whose object is to prepare recommendations for effecting needed reforms and changes in both the structure and procedure, civil and criminal, in these fields.

The preliminary study and report of this Committee recognizes that known inequities exist in the administration of justice in these courts, particularly in uniform procedure, rules of evidence applied, and qualifications of justices of the peace and police magistrates.

The JBC of Colorado is also among the first to offer its support in activating and giving consideration to the sixteen resolutions in regard to enforcement of traffic laws. As they are applicable to Colorado, they will be considered in the survey and in the Committee's recommendations for needed reforms.

Milwaukee Journal

Front (left to right) Municipal Court Judge Herbert J. Steffes, of Milwaukee, Wisconsin, former Senator Harry Cain, of Tacoma, Washington, Circuit Court Judge Ronald A. Drechsler, of Milwaukee; in the rear is Thomas N. Tuttle, President of the Milwaukee Junior Bar.

Are You Receiving the JBC Young Lawyer?

The Young Lawyer is one of the Conference's publications available to all members. If it has not been reaching you, or if you have missed any issues, promptly notify Miss Charlotte Murphy, Editor-in-Chief, P. O. Box 7783, Washington 4, D. C., furnishing full address, including office or apartment numbers, as well as street address and city zone.

Make Your Hotel Reservations for New York Now!

■ The Eightieth Annual Meeting of the American Bar Association will be held in New York City on July 14-16, 1957, and will then recess to reconvene in London, England, July 24-30. Most of the Sections of the Association will meet prior to July 14 in New York, and certain of them will reconvene in London. The January, 1957, issue of the JOURNAL carries a detailed announcement concerning hotel reservations in New York (page 75), and at pages 45-47 there will be found the first announcement with respect to the Program, both in New York and in London.

Requests for hotel reservations in New York should be addressed to the Reservation Department, American Bar Association, 1155 East Sixtieth Street, Chicago 37, Illinois, and should be accompanied by payment of the $10.00 registration fee for each lawyer for whom a reservation is requested, UNLESS PREVIOUSLY REGISTERED FOR LONDON, WHICH REGISTRATION FEE INCLUDES THE NEW YORK PORTION OF THE MEETING.

Reservations will be confirmed approximately ninety days before the meeting convenes.

Practicing Lawyer's guide to the current LAW MAGAZINES

Arthur John Keeffe • Editor-in-Charge

ANTITRUST: The proceedings of our Antitrust Section's annual meeting in Washington, D.C. (April 5-6, 1956) have now been published and mailed to Section members. Judge Barnes who retired July 1, 1956, to become a Judge on the United States Court of Appeals for the Ninth Circuit, and John W. Gwynne, the new chairman of F.T.C., discussed the Clayton Act; Taggart Whipple, of the New York Bar, spoke on treble damage actions; Thomas F. Butler, of the Ohio Bar, spoke on the constitutionality of the new tolling provisions for treble damage actions in Section 5 of the Clayton Act as amended by the 84th Congress in its first session in 1955; Albert E. Sawyer, of the New York Bar, a member of the Taggart Cost Justification Committee, commented on their report; Frederick M. Rowe, of the District of Columbia Bar; Joseph E. Sheehy, Director of the Bureau of Litigation of the F.T.C.; C. Brien Holland, of the Houston, Texas, Bar; and John T. Duffner, a trial attorney in the Antitrust Division of the Department of Justice, discussed Sections 2 and 3 of the Clayton Act, the criminal penalties in Section 3 of the Robinson-Patman Act, known as the Borah-Van Nuys Act, and pending bills for the amendment of the Clayton Act. Of particular interest in this symposium are the pieces of Rowe and Butler. Rowe apparently intended to discuss Section 3 of the Clayton Act, but gave up when the *Beltone Case* (F.T.C. Docket 5825) came down on February 16, 1956, slavishly following *Dictograph* v. *F.T.C.*, 217 F. 2d 867, and *Anchor Serum Co.* v. *F.T.C.*, 217 F. 2d 867. He contends the *Beltone* decision, following the Second Circuit's decision in *Dictograph* and the Seventh's in *Anchor Serum*, reasserts in full vigor the "quantitative substantiality" test of the *Standard Stations* case (*Standard Oil of California* v. *United States*, 337 U.S. 293). Likewise Rowe believes the four *Automotive Supply* cases of May, 1955 (*Edelmann* Docket 5770, Moog 5723, *Whitaker Cable* 5722 and *Niehoff* 5768) indicate that F.T.C. has reverted to the *per se* philosophy of the *Moss* case (*Samuel H. Moss Inc.* v. *F.T.C.* 148 F. 2d 378, Second Circuit) and the *Morton Salt* case (334 U.S. 37). With equal pessimism Mr. Rowe discusses the tendency of F.T.C. to make blanket orders. An interesting and valuable piece it is, but the reader should remember that time and again the Supreme Court has said that from the denial or granting of a writ of certiorari no implication of approval or disapproval may be drawn. *Anchor Serum* is so different from *Dictograph* that *Beltone* so resembles, your editor would never believe that Judge Medina's opinion there represents the law until the Supreme Court declares it. And the dissent of Douglas, J., in *Standard Stations* is still perhaps the most sensible thing that has been said on antitrust. But the paper at the Washington meeting that wins this department's Oscar is the one delivered by Thomas F. Butler, Jr., of the Toledo, Ohio, Bar. Prior to its amendment in 1955, Section 5 of the Clayton Act that tolls treble damage actions pending the outcome of an antitrust suit, read that tolling took place "whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States". The 1955 amendment changes this to "any civil or criminal proceeding" and deletes the old language. It has been a matter of grave concern to some of us that both the Attorney General and the Federal Trade Commission can enforce the Sherman Act and the Clayton Act.

Whereas the Attorney General can go to court and obtain a civil or criminal decree, the F.T.C. proceeds by filing a complaint before itself asking for a cease and desist order. Under Section 5 of the Clayton Act, the F.T.C. can order an accused to cease and desist from acts that violate the Clayton Act. Butler's point is that the F.T.C. order to cease and desist is not "any civil or criminal proceeding" and so does not toll the statute of limitations for treble-damage actions, now four years under the new 1955 law. Citing the dissent of the late Judge Evan A. Evans of the Seventh Circuit, in *Brunswick-Balke-Collender Co.* v. *American Bowling and Billiard Corp.*, 150 F. 2d 69 (Second Circuit), *Proper* v. *Bene*, 295 Fed. (E.D. N.Y.) 729 and *F.T.C.* v. *Cement Institute*, 333 U. S. 683, Butler concludes that an F.T.C. proceeding is not a "suit or proceeding in equity" within the meaning of Clayton Act 5, as amended. Under the Administrative Procedure Act, Butler maintains F.T.C. cease and desist orders are "agency proceedings" even when automatically entered by failure to appeal from the hearing examiner or when a United States Court of Appeals affirms the F.T.C. order. Moreover, the F.T.C. under guise of enjoining an unfair method of competition can proceed under Section 5 of the Federal Trade Commission Act against a violation of either the Sherman Act or the Clayton Act or an act which in its incipiency has not risen as yet to the indignity of either a Sherman Act or a Clayton Act offense. Curiously, it has been held at the circuit and district levels that Section 5 of the Federal Trade Commission Act is not one of the "antitrust laws" meant by the treble damage sections (*Proper* v.

John Bene, 295 Federal (E.D. N.Y.) 729, and *Samson Crane Co.* v. *United National Sales, Inc.,* 87 F. Supp. (D.C. Mass.) 218, affirmed 180 F. 2d 896). Butler's proposition is simple but a brilliant suggestion. Since the Attorney-General's enforcement of Sherman and Clayton clearly tolls the treble-damage provisions of Clayton 5 and the Federal Trade Commission's enforcement does not, and since both are free to prosecute for the same acts, the tolling provisions are unconstitutional under the due process clause of the Fifth Amendment. His first point is that the Attorney General's suit can toll the treble-damage statute of limitations for fifteen years as happened in the *Paramount* case whereas no tolling at all occurs if you are so fortunate as to be sued by F.T.C. This is a violation of procedural due process. His second point is even more fascinating. It is that this denies not due process, but equal protection of the laws within the meaning of *Brown* v. *Board of Education* and the other segregation cases. Of course, the equal protection clause is in the Fourteenth Amendment, not the Fifth, and could be said to apply only to the states. After all it reads: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." Chief Justice Warren, in *Bolling* v. *Sharpe,* 347 U.S. 497, had the problem with respect to segregation in the District of Columbia and solved it in a way that many a law school class denounces by saying that due process in the Fifth Amendment means the same as equal protection in the Fourteenth Amendment, which it does not. Seizing on the decision in *Bolling* v. *Sharpe,* Butler contends that the tolling provisions in Clayton 5 are unconstitutional as depriving an accused of equal protection of the laws under the Fourteenth Amendment as read into the due process clause of the Fifth Amendment. Apparently the case of *Congress Building Corporation* v. *Loew's,* now pending in the district court in Chicago, also raises two other constitutional points in treble damage actions: (1) Clayton 5 "violates the Fifth and Sixth Amendments because it imposes sanctions in the form of the suspension of the statute of limitations in private treble damage actions and the creation of prima facie evidence in those actions" that deprive the accused of a fair trial; and (2) the prima facie evidence presumption of Clayton 5 "violates the jury trial provisions of the Seventh Amendment". Never underestimate the ingenuity of the good lawyer is the lesson one learns again in reading Butler's fine piece. This leads me to observe that our Antitrust Section should distribute these speeches in advance so that they could be discussed at the meeting. The method used by Harvard Law School at its Marshall meeting of advance distribution, then an abreviated oral summary by the writer, a criticism by a selected commentator and a general discussion by the entire audience, would result in a stimulating meeting with a paper like Butler's. Along with the pamphlets that our Association's Antitrust Section publishes, antitrust lawyers everywhere annually acquire the pamphlet by Commerce Clearing House, Inc., Chicago 30, Illinois, of the speeches before the Antitrust Section of the New York State Bar Association. This year's is called "Antitrust Law Symposium, 1956." Two of the speeches were so good the *Mercer Law Review* of the Walter F. George School of Law (Spring, 1956, Vol. 7, No. 2) has reprinted them, an unusual compliment. The one is by Congressman Emanuel Celler, of New York, Chairman of the House Judiciary Committee's Subcommittee on Antitrust. It is called "Corporation Mergers and Antitrust Laws", pages 267-279. The other is by Professor Milton Handler of Columbia Law School, entitled "Quantitative Substantiality and the Celler-Kefauver Act—A Look at the Record", pages 279-289. Professor Handler's piece is really a reply to Congressman Celler's. In the same issue Senator Estes Kefauver pays his disrespects to the Attorney General's Committee's Report in a piece entitled "The Attorney General's Committee Report in Perspective", pages 258-266. (Write *Mercer Law Review* at Macon, Georgia, and send $1.00) In the *Georgetown Law Review* for March, 1956 (Vol. 44, No. 3, pages 363-394), Philip Marcus, of the New York Bar and an attorney with the Department of Justice, writes on "An Antitrust Legislative Program". He presents detailed drafts of changes in the antitrust law that reflect careful study and ought to prove invaluable to draftsmen of antitrust legislation. (Address Georgetown Law Review at the Georgetown Law School in Washington, D.C., and send $1.25) Professor Kenneth S. Carlston, of the University of Illinois Law School, writes on "Foreign Economic Policy and the Antitrust Laws" in the January, 1956, issue of the *Minnesota Law Review* (Vol. 40, No. 2, pages 125-143.) He discusses the problem in the light of the United Nations and considers the decided cases and the Attorney General's Committee's Report. (Address: Minnesota Law Review at the law school in Minneapolis, Minn., and send $1.75)

CORPORATIONS: In our day it has become fashionable to buy control of this corporation or that. There are several methods. The seller may have a percentage of control from 10 per cent to 100 per cent and where the sale is of less than 100 per cent the question at once arises as to what offer, if any, is made or should be made to other stockholders. Many a corporation in America today is controlled by a holding of less than 5 per cent of the stock. Those interested will find rewarding the article of Professor Noyes Leech in the *University of Pennsylvania Law Review* entitled "Transactions in Corporate Control". (April, 1956, Vol. 104, No. 6; pages 725-841; address: 3400 Chestnut Street, Philadelphia 4, Pennsylvania, and send $1.75).

EASEMENTS: Professor Gardner Cromwell, of the New York University Law School, writes an article en-

titled "Easements and Market Value" in the *Montana Law Review* for the spring of 1956 (Vol. 17, No. 2 at pages 143-159, single copy price $1.50, address Missoula, Montana). The article is interesting and valuable to those lawyers who have condemnation suits for easements. Professor Cromwell discusses not only surface easements for railroads, highways and waterways but also subsurface easements for sewers, pipelines and the like. He also deals with overhead easements.

HELICOPTERS: Raymond Sawyer, the Executive Director of the Civil Aeronautics Board, spoke recently to the Eighth Annual Convention of the Helicopter Association of America at the Sheraton Palace Hotel, San Francisco, California. His speech is printed in the winter, 1956, *Journal of Air Law and Commerce* which is published quarterly (Vol. 23, No. 1, send $1.75 for a single copy to 1818 Hinman Ave., Evanston, Illinois). It is a corking article and states the need for a helicopter with twin engines, seating fifty people, which can travel 150 miles an hour or better. It seems that though the airlines carry 75 per cent of passengers who travel over 1000 miles, they carry only 2¼ per cent of those who travel less than 250 miles. As Robert Peach of Mohawk Airlines said in abandoning helicopter transportation with the present capacity plane, helicopter manufacturers should concentrate on community education and planning as the airlines are ready to buy as soon as a plane can be made. Bell, Pissecki and Sikorsky now have helicopters that come close to the requirements. When we consider that it was not until the first year of World War II that a helicopter was first flown, and that the industry now makes eleven different models and has fourteen in prototype and nine in design stage and a backlog of $500,000,000 in orders, we had better get ready our airports and ourselves.

LAW REFORM: R. E. Megarry, a barrister of Lincoln's Inn and an assistant editor and book review editor of the *English Law Quarterly Review*, has a splendid piece in the *Canadian Bar Review* with respect to this subject (Canadian Bar Review, Vol. 34, No. 6, June-July 1956, pages 690-712, edited by G. V. V. C. Nicolls, Q.C., 1390 Sherbrooke Street West, Montreal 25, Quebec, Canada, no single issue price stated). Barrister Megarry calls attention to the need for a permanent law reform body such as has been suggested for this country, namely a national ministry of justice. A similar suggestion, of course, has been made in England, and there have been two committees, one before the war and one following the war. Megarry's article is very helpful in that he tells about the composition of the English committees and the details of their accomplishments. As one would expect, the reforms which have been achieved are reforms which the average lawyer in his law office meets, but never does anything about. His point is that every lawyer when he meets a stupid point of law that needs correction should jot down that point on a pad and should send it to the committee. In this country, of course, now that we have the magnificent new house and library of the Association in Chicago, lawyers could send such points there. The committee in England has been able to accomplish reforms which lack political and sex appeal for our legislators. With great courage Barrister Megarry suggests that the Canadians set up a law reform body. In this connection he refers favorably to the article by Professor John Winchester MacDonald in 40 *Cornell Law Quarterly* 641, in which Professor MacDonald details the successful history of the salaried New York Law Revision Commission (page 706) in correcting outmoded rules of law. Those of us interested in law reform will want to read this splendid piece.

MILITARY LAW: In the summer, 1956, issue of the *Cornell Law Quarterly*, Professor Robert Pasley takes Secretary Wilson and his former counsel, H. Struve Hensel, to task for giving dishonorable discharges to those twenty-one Americans who preferred to remain with the Chinese Communists rather than to return home. In advising Mr. Wilson that as Secretary of Defense he could do this, apparently Mr. Hensel overruled the Judge Advocate General of the Army. And, if Professor Pasley be correct, many other military law authorities. This was par for the course. Those of us interested will want to read what Pasley writes as it is up to his high standard. As an appendix he publishes the opinion letter Hensel wrote to Wilson and that too, is up to Struve's usual high standard. More your deponent saith not, and between Pasley and Hensel claims his privilege. What I know about courts martial they both taught me and they really now have me confused. (Write the Cornell Law Quarterly at the Cornell Law School in Ithaca, N.Y., and send $1.50 for a single issue.)

MILITARY LAW: In the spring, 1956, issue of the *South Carolina Law Quarterly* (Vol. 8, No. 3; pages 346-354), Professor Lester B. Orfield has an article entitled "Jurisdiction of Foreign Courts Over Crimes Committed Abroad by American Military Personnel". It concerns the so-called Status of Forces Agreements under which the United States allows foreign countries to try its military personnel for offenses committed off foreign bases occupied by our troops. See the case of Private Richard Thomas Keefe, *sub nomine United States* v. *Dulles*, 222 F. 2d 390 (D. C. Cir. 1954), *certiorari denied*, 75 S. Ct. 440. Professor Orfield believes the agreements desirable and constitutional. One can be pardoned for doubting that the constitutionality is so clear as Professor Orfield believes, but one can appreciate that the article is valuable. First, it is short. Second, it calls attention to these prior law review articles. Murray L. Schwartz, in 53 *Columbia Law Review* 1091, enti-

tled "International Law and the NATO Status of Forces Agreement"; Edward D. Re, in 50 *Northwestern University Law Review* 349, entitled "The N.A.T.O. Status of Forces Agreement and International Law"; and Arthur E. Sutherland, Jr., in 68 *Harvard Law Review* 1374 at 1379-80. The Keefe case is noted in 30 *St. John's Law Review* 111, and a curious coincidence is that Professor Re teaches there. See also article in 22 *Fordham Law Review* 155 at 167 by Professor Harold F. McNiece of St. John's Law School and John V. Thornton of New York University Law School entitled "Military Law from Pearl Harbor to Korea". It seems in 87 per cent of the cases the courts of the foreign country have waived jurisdiction and allowed American courts martial to try our men for off-base offenses. Professor Orfield states that "the strange maws of foreign prisons" have consumed some fifty-eight American prisoners and for the figures he refers to the valuable article that *Newsweek* published, "When G.I.'s Get in Trouble", *Newsweek*, pages 33-37, February 20, 1956; the *New York Times* of March 30, 1955; the report of the Section of International and Comparative Law's committee on Military, Naval and Air Law in 1954 at page 1041; and, Professor Re's piece, in 50 *Nw. U. L. Rev.* 349, at 355-356. The Status of Forces Agreement is set forth in 48 *Am. J. Int. L. Supp.* 83-101 (April, 1954). It was ratified by the United States Senate on July 15, 1953, by a vote of 72 to 15 and came into force August 23, 1953. Senator Bricker proposed a reservation to withhold from "a receiving state all jurisdiction over crimes committed by members of United States Forces", page 347. It was defeated 53 to 27. The House Committee on Foreign Affairs has published two printed volumes of testimony taken in the 84th Congress in hearings on the Joint Resolution of Representative Bow, of Ohio, to require that American military personnel be tried by American courts martial for their off-base offenses or our forces be withdrawn. Anyone writing the House Committee will be sent these two volumes free. Valuable articles such as the one by Professor Re, of St. John's Law School, are printed as exhibits in these hearings. There is also some testimony as to the Status of Forces Agreement in the House Armed Services Committee, before the Brooks Subcommittee that is sitting on the bill to amend the Code of Military Justice, but these hearings have not as yet been printed. Professor Orfield says that the New York County Lawyers Association pressed the House Armed Services Committee to provide Americans tried before foreign courts under the Status of Forces Agreement with free counsel. The bill has now passed the House.

Attention should be called to the 1956 issue of the *Catholic University Law Review* which is a symposium issue devoted to courts martial. The leading article is by the writer, entitled "JAG Justice in Korea" and discusses briefly the constitutional problems raised by the Status of Forces Agreements. (Write 1323 18th Street, N.W., Washington 6, D.C., and send $4.00 for a subscription or $2.00 for a single issue.)

OIL AND GAS LAW: Almost the entire June, 1956, issue of the *U.C.L.A. Law Review* (Vol. 3, No. 4) is devoted to printing lectures with respect to oil and gas law delivered in December of 1955 in the City of Los Angeles, California, under the auspices of the State Bar of California through its Committee on Continuing Education of the Bar in collaboration with the Los Angeles Bar Association. (Address the University of California at Los Angeles Law School at Los Angeles, California, and send $1.50.)

PROCEDURE: The May, 1956, *Stanford Law Review* (Vol. 8, No. 3, pages 472-478, price $1.50, address, Stanford, California) has a most valuable note on *General Motors Corporation* v. *N.L.R.B.*, 222 F. 2d 349, a decision of the Fifth Circuit Court of Appeals. Ordered to cease and desist from an alleged unfair labor practice, General Motors, "basing jurisdiction on the fact that it was doing business in that circuit" appealed there. The note writer points out that, while the Fifth Circuit enforced the order, the statute permits a selection of circuits. Since the Federal Trade Commission and the Clayton Act provisions are similar then in antitrust cases, a similar selection of a favorable circuit is permitted. Of course, the Government can pick, too. The note writer calls for amendment.

TORTS: The Winter, 1956, *Journal of Air Law and Commerce* (Vol. 23, No. 1, pages 108-114; price $1.75 per copy; address: 1818 Hinman Avenue, Evanston, Illinois) has a note on the suit that Northwest Air Lines brought against the Glenn L. Martin Company for the faulty wing design of the Martin 202's that failing to withstand the reverse pressures of the thunderhead fell into the Great Lakes even as Knute Rockne was killed in the old German Focker when its wings fell off. Anyone who sues an airplane manufacturer for faulty design will want this note. It discusses all the points. The effect of Northwest's inspection and acceptance of the ship; the effect of the licensing of the ship as airworthy by the Civil Aeronautics Administration; whether the doctrine of *res ipsa loquitur* can be used. Apparently, there was a jury verdict for Glenn L. Martin, but the Sixth Circuit reversed because of the court's instructions to the jury *(Northwest Airlines* v. *Glenn L. Martin,* 224 F. 2d 120, *certiorari denied* 24 U. S. Law Week 3184). One can quarrel with the notewriter's suggestion (page 113) that by statute these cases could be tried without jury or should. A statute might not be enough, as the Sixth Amendment to the Constitution will perhaps require a jury trial.

BAR ACTIVITIES

Charles Ralph Johnston • Editor-in-Charge

■ The Interstate Bar Council, a regional conference of the eleven western state bar associations, will hold its ninth annual meeting at LaFonda Hotel, Santa Fe, New Mexico, on Friday, February 22, 1957, directly following the Midyear Meeting of the House of Delegates in Chicago. At the meeting last year in Cheyenne, Wyoming, the Articles of Association of the group were amended to permit the territories of Hawaii and Alaska to become members and send delegates to the Council. Hawaii has already become a signatory and member of the group and it is expected that Alaska will do so shortly.

Each Bar Association is allowed three delegates who usually are past and current state bar association presidents and House of Delegates members from the West. In charge of local arrangements for the hosts, State Bar of New Mexico and Santa Fe Bar Association, will be Ross L. Malone, Roswell, New Mexico, and Lorna M. Shipley, Alamogordo, New Mexico, both members of the House of Delegates of the American Bar Association.

Officers are: President, Walter E. Craig, Phoenix, Arizona; Vice President, William H. Robinson, Jr., Denver, Colorado; Secretary, John H. Holloway, Portland, Oregon. John Shaw Field, Reno, Nevada, is Chairman of the Committee for Liaison with the American Bar Association, its Sections and Committees and other groups.

In addition to Hawaii, the state bar organizations of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming are all signatories to the original Articles of Association. Each delegation at the meeting makes reports on its outstanding bar activities and accomplishments for the past year followed by round table group discussion and questions and answers. These reports usually relate to admission standards and procedures, post-admission educational work, disciplinary procedures, public relations, improvement of the administration of justice, legal ethics, unlawful law practice matters and free advisory legal assistance provided by the state Bar for the legislature as a public service in some of the states.

A full program of entertainment for the wives and attending delegates is usually provided.

■ We are informed by Henry C. Kessler, Secretary of the York County Bar Association, that all of the ninety-eight members of that Association are now members of the American Bar Association, with dues paid by the local association. Thus Pennsylvania boasts three county associations which maintain 100 per cent membership, the other two being Lycoming County and Tioga County. York County is the largest of these associations with its membership of ninety-eight.

■ The Seattle Bar Association in December undertook the responsibility of representing indigent persons called by the Un-American Activities Committee of the House of Representatives of the United States. Some of those subpoenaed to appear as witnesses approached John N. Rupp, President of the Seattle Bar Association, and explained that they were without funds to employ counsel. The assistance of the Seattle Bar was in accord with the resolution of the American Bar Association's Committee on Individual Rights as Affected by National Security adopted by the House of Delegates in Boston at the 1953 Annual Meeting which read in part as follows:

> That the American Bar Association reaffirms the principles that the right of defendants to the benefit of assistance of counsel and the duty of the Bar to provide such aid even to the most unpopular defendants involves public acceptance of the correlative right of a lawyer to represent and defend, in accordance with the standards of the legal profession, any client without being penalized by having imputed to him his client's reputation, views or character.
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> That the Association will support any lawyer against criticism or attack in connection with such representation, when, in its judgment he has behaved in accordance with the standards of the Bar.

Mr. Rupp's statement before the Committee follows:

"There will be a number of Seattle attorneys appearing at this hearing in the capacity of counsel for certain of the witnesses, and I want the record to be clear as to the circumstances under which they will appear. Briefly put, they will be here because, as President of the Seattle Bar Association, I appointed them to represent the persons for whom they will act as counsel. I appointed them because I was informed that these several witnesses were without counsel and had no funds with which to employ counsel, and I was asked to appoint counsel for them. These attorneys will, of course, serve without pay and as a public duty, in conformity with the oath which each of them took when he became a member of the Bar.

"Since I would not ask any of my colleagues to undertake a task without undertaking a similar one myself, I shall appear later at this hearing representing at least one of the persons subpoenaed. The others I have appointed are: Charles Horowitz, the First Vice President of the Seattle Bar Association; Chester C. Adair and David O. Hamlin, two of the Trustees of the Association; David J. Williams, Chairman of the Association's Civil Rights Committee;

and Arthur Barnett, a member of that Committee. If additional counsel are appointed, that fact will be made known to the Committee.

"In connection with this representation, and with the appearances of any lawyers before the Committee, I should like to have the record contain a statement made over two years ago by the trustees of the Association. It is published in 30 *Washington Law Review* 327-328, and it reads as follows:

BE IT RESOLVED by the Board of Trustees of the Seattle Bar Association, on this 11th day of June, 1954:

That certain of the fundamental principles underlying the representation by lawyers of unpopular persons and causes should be set forth at this time for the information and assistance of the public and the bar and that, therefore, the following statement should be issued and made public:

Throughout the course of history lawyers have been frequently called upon to represent and defend persons and causes known to be unpopular. This has been particularly true in criminal matters, but it has been and is also true in other fields, including investigations and hearings conducted by the legislative department of government.

The right of an accused person, or of a person called as a witness in a legislative investigation, to have legal counsel carries with it the right of the lawyer to represent and defend him in accordance with the ethical standards of the bar.

Having undertaken any such representation, the lawyer has a duty to assert for his client every remedy or defense authorized by the law of the land. The duty of the lawyer is to be performed, however, only within the bounds of the law, and his office does not permit, nor demand of him, for any client, any violation of the law nor any manner of fraud nor improper conduct.

The public and the bar should recognize the duties and responsibilities of the lawyer in such cases and should keep in mind that such representation, when performed in accordance with the applicable ethical standards, is lawful and proper and that it does not impute to the lawyer his client's views, character, deeds or reputation.

"There is an analogy to what we have done here. It is in the field of the criminal law. There, when a person is charged with crime and arraigned before the court, if he is without counsel and has no funds to enable him to employ an attorney, the court will appoint an attorney for him to serve without pay (or in our state courts, for a small fee paid by the state). The duty to accept such appointments is a part of the obligation of every lawyer.

"The proceedings before this Committee are not, however, criminal proceedings, and the Committee has no power to appoint counsel for witnesses summoned to appear before it. In the absence of that power, therefore, the Seattle Bar Association has undertaken the task of supplying counsel for indigent witnesses just as the courts, for centuries, have appointed counsel for indigent defendants.

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"I am proud to say that no one of those whom I have appointed hesitated for a moment in accepting the appointment, even though it was made on short notice and necessitated the cancellation of many appointments and a serious disruption of the busy practice of each of these gentlemen. I think that their conduct is in keeping with the very highest traditions of the Bar, and I am happy to inform the Committee of these facts, so that the Committee and the public will understand them."

■ Oddly enough, within a period of exactly ten days, we have been advised that each of two widely separated associations has initiated a system of sponsorship for beginning lawyers in which an established lawyer serves as adviser to give the young lawyer interested and friendly advice concerning opportunities for employment, the merits of prospective employers and in general to counsel and advise the young lawyer during the first year or so of his career.

The Beverly Hills (California) Bar Association, of approximately 550 members and with no secretary or other employed assistance, has adopted a program called the "Big and Little Brother" placement service. The Big Brother is a member of the Bar Association who is willing to take under his wing a "Little Brother", a recent graduate of a law school who is looking for employment in the Beverly Hills area. Law schools in that area and elsewhere are asked to inform their students about the program. Communications are circulated to the members of the Association asking their assistance as guides and counsellors to the newly admitted members of the Bar.

Louis M. Brown, former Chairman of the Beverly Hills Bar Association Placement Committee, who put this plan into action, reports "Through this program we believe we have enabled many young attorneys to find employment and, additionally, we feel that through the guidance of a member of the Bar, the young lawyer has been enabled to find a better position or to make more satisfactory arrangements than might otherwise be possible. The program serves to introduce young lawyers to the activities of the Beverly Hills Bar Association. It also enables us to find activity for many of our members and to engage in a placement program without maintaining a placement office. The Placement Committee of the Association acts as the co-ordinator.

Inquiries with respect to the program may be addressed to Laurence W. Ritter, 424 South Beverly Drive, Beverly Hills, California, Chairman of the Beverly Hills Bar Association Placement Committee.

The El Paso County Bar Association (Texas) advises us as follows:

"'Good public relations begin at home' is an indisputable philosophy that the El Paso Bar Association has incorporated into its regular program.

"A new activity, appropriately called the 'Big Brother' program, was instituted recently by the El Paso Bar for newly licensed lawyers who enter the practice of law on their own.

"In the case of a fledgling attor-

ney, the Bar appoints an experienced member to whom he may turn for coaching and advice during his first year of practice in the city.

"The program aim is to imbue the inexperienced lawyer with a firm understanding of the practical aspects of the profession, how to get around at the courthouse, where to file legal documents; and, vitally important, to give the new lawyer a firm grounding in the day-to-day observance of legal ethics.

"The program, of course, does not cover new lawyers associated with firms.

"From a long-range standpoint, how more effectively can the profession seek to protect its own, as well as the public to whom it owes its first responsibility! This selfless activity is unique in Texas."

Theodore Andress, El Paso National Bank Building, El Paso, Texas, is Chairman of the El Paso County Bar Association Big Brother Committee.

We have one word of comment: A younger lawyer of our acquaintance with whom we discussed this program was enthusiastic. He said: "To be sponsored and advised by an older and experienced lawyer would have been a Godsend to me during the first year of my practice. But why do they want to stultify us by calling us 'Little Brother'? I was 24 years old when I was graduated from law school. After finishing my Army hitch, I was 28 when I actually began to practice law. I held the rank of Lieutenant Colonel in the Army when I was discharged and I went in as a buck private. I'm a big boy now. It seems to me that it would improve the idea and render it more palatable to the young lawyer, if more dignified terms could be used to describe the adviser and the neophyte lawyer. The terms 'Junior' and 'Senior' for many years have been used to describe the relationship between an older experienced lawyer and his clerk. Why couldn't some similar terms, which wouldn't make the young lawyer appear ridiculous, be used? I suggest 'Advisor' or 'Senior Counselor' instead of 'Big Brother' ".

■ As evidence that humor—even if unconscious—does persist and occasionally rears its intriguing head during the solemn proceedings of association meetings, we submit this:

"The chair recognizes Ebenezer ————.

"There are too many coffee hours around this nation of ours, now. That's what is the trouble with it.

"And now Judge ——, I thought he came here to pass his compliments. He came here to advertise for this resolution. That's what he came for. Somebody must have brought him for that. He says that there are so many more superior court judges now that there ought to be more supreme court judges. Well, when the superior court judges decide to work forty hours a week, we won't have too many superior court judges. The superior court judges now open at 10 o'clock and close at 4, and the courthouse is dark almost all day Friday and all day Saturday. Why, you could add twenty more superior court judges in —— County and then cut down to opening at 11 and closing at 2.

"Now, I can't make a living on those hours and do it honestly. And I don't do it. When I came to ————, the court opened at 8 o'clock on the old hill and closed at 6. We got some work done. Now, I drag in at 10 o'clock and there'll be some newspaper man wants to take a picture and so the jury waits and the witnesses all wait and we start in about a quarter after ten.

"When I was a boy it was the pride of a bricklayer to lay 1,000 bricks a day. Now the labor unions say, 'Mr. Bricklayer, you cannot lay more than 400 bricks.' That's a day's work. He lays 400 bricks in about three hours and he goes home, gets his automobile and gets in the toils of the law, gets arrested for drinking. The State sells him the liquor and then arrests him for drinking it! Then the police get half of the traffic fine for their kitty.

"There is an old adage: 'Beware of the dangers of leisure.' There are too many people who think more of the frivolities of the hour than they do of the blessings of eternity, gentlemen. There are more 7-Up signs now than there are church steeples, sir. When people cease to work, a nation goes into degradation. That's the trouble. I can't make a living that way and do it honestly, and I say to you if people work there won't be so much iniquity and there won't be so much leisure around here. Now, I know that in the late '20's the supreme court decided almost twice as many cases as they are doing today. That's the record, and this was a pertinent question that was asked you, and you answered it partially but you didn't entirely.

"It may be that temporarily in our practice of law, once in awhile we get a heavy work load, and we have to work Saturdays and Sundays in in order to catch up that work load, but that doesn't mean that we should hire four or five more lawyers and stenographers and increase our overhead because there is an old adage: 'It's dark today but there will be sunshine tomorrow.'

"Mr. President, I am bitterly opposed to this resolution. I think it's wrong, and I don't agree with it at all. It may be that the judges on the supreme court feel that they are overworked, but I"ll tell you another story and I can prove this, too. One of the clerks of one of the supreme court judges said the other day, 'This is the easiest job I ever had. Every so often the judge says at noon, "Well, we won't work this afternoon. We'll play golf." '

"There was a time when Greece was the leading nation of the world. When idleness overcame that country, it lost and it disappeared, and was followed by Rome in the height of its power when people worked. By and by leisure became the hour of the day, and Rome disappeared from the face of the earth as a power. Then came France. After the

First World War the French thought they could live without working and live on the tribute of the Germans, and when the Second World War came they didn't have any soldiers who would fight.

"Beware of the dangers of leisure, gentlemen. I am not in favor of this resolution."

■ At its Ninth Conference in Dallas, Texas, last April, the Inter-American Bar Association changed its constitution and by-laws to permit qualified individuals to become members of the Association. Until that meeting the Association, founded in 1940, had had only organizational and institutional members.

After the initial organizational meeting in Havana, Cuba, in 1941, subsequent meetings of the Association were held in Rio de Janeiro, Mexico City, Santiago, Lima, Detroit, Montevideo, Sao Paulo and Dallas. At these conferences subjects of importance and of timely interest have recently been explored, including initial consideration of the legal problems of atomic energy and also of the legal problems regarding the economic development of the countries of the Americas.

It has become more important than ever before for members of the legal profession in the United States and in the Latin-American countries to become better acquainted and thus to establish more fruitful relationships. An awareness of the desirability of achieving these objectives led to the creation of the various categories of individual membership in the Inter-American Bar Association.

There are four classes of individual memberships:

Juniors (five years of practice or less); Seniors (more than five years of practice); Associate (similar to Senior membership requirements) and Life membership. Annual dues are: Juniors, $5.00; Seniors, $10.00; Associates, $25.00. Life membership is conferred upon those who have made a one-time contribution of $500.00 or more.

For information, write to William Roy Vallance, Secretary General of the Inter-American Bar Association, 1129 Vermont Avenue, Washington 5, D. C.

In the Public Service

■ **We ask every bar association which has published any public service pamphlets, leaflets or other materials to make them available to any other association interested, for a nominal charge, with permission to adapt, reproduce and distribute them under the name of such other association.**

We shall be happy to serve as liaison agent in this matter and we ask every bar association to inform us whether it will, or is unable to, participate in this undertaking. From the secretary of every participating association, we should appreciate receiving a letter giving the requested permission and enclosing three copies of each such pamphlet, leaflet or other material; we then shall publish under the above caption the name and address of the association which prepared the material, its title and, if necessary, a brief resume of its contents.

To obtain the courtesy of using any public service materials mentioned in this section, the executive secretary or secretary of your association should write to the publishing association, enclosing a check for 50 cents for the first six copies or less plus 5 cents for each additional copy requested, to cover the costs of handling, packaging and mailing. If in special cases there is a greater charge for any item, the amount will be stated.

We believe that those participating in this joint endeavor are making a substantial contribution to good public relations of the Bar while rendering a public service of the highest order.

■ The following were prepared by the NEW YORK STATE BAR ASSOCIATION, 99 Washington Avenue, Albany 10, New York:

Do You Need a Will? This pamphlet differs from the usual variety covering this subject in that it consists entirely of a discussion, overheard on a train, between a lawyer and a layman attempting to decide whether he really needs a will. The layman has a wife and a young son and he finds himself very much surprised at what would happen to his estate in case he did not leave a will. It is a well done job of educating the layman in the intricacies met in effecting the disposition of an estate to those persons and in the manner he desires, and the fact that only by a properly drafted will prepared by a lawyer can he be assured that his wishes will be complied with.

Buying and Selling Real Estate includes an enumeration and definitions of the principal terms met with by the buyer and seller of real estate, together with many caveats and cautionary notes.

Do You Have Tax Problems? This is a discussion of the reasons for considering the tax consequences of simple everyday transactions. It gives the following examples of situations in which legal counsel is advisable: Are you selling your home? Are you selling a farm? Are you a salesman on a salary? Are you going to give to charity? Should you do business as a partnership or a corporation? Should you own or lease your business property? What if the Treasury calls? Are you planning to sell your business? Do you have an estate tax problem? How will you meet your estate tax bill?

Buying on Time? is a concise summary of certain facts the buyer should know before making installment purchases. It emphasizes that

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her will, marriage does not operate likewise on the will of a male.

A Second Program . . . *International Uniformity*

The second suggestion—that we strive for some degree of universality regarding at least some phases of the law of wills—naturally encounters a variety of obstacles. National uniformity seems simplicity itself compared to universal uniformity. Different peoples, different languages, different customs, different traditions, different necessities for different protectives, as well as different laws seemingly defy reconciliation or harmonizing with those of the states. Even so, all people, everywhere, are touched by the law of wills. Hence, steps toward rapport are worth taking.

Although this is not intended as an extensive travelogue in the vast and heterogeneous realm of wills, some of the dissimilarities, and impediments to universality, will be noted.

No insurmountable snags are struck in the friendly Dominion of Canada.

In the ten Canadian provinces at least two disinterested attesting witnesses are required. In seven, the testator must have reached 21. In Newfoundland those 17 or older are deemed testamentally competent. And in Alberta one in service, of any age, or a minor who has reached 19 and is married, is testamentally qualified. In Ontario a minor in service is vested with testamentary capacity. Holographic wills are valid in six of the provinces, and in a seventh—Newfoundland—a person in service may make such a will. Nuncupative wills of those in service are valid in all the provinces except Alberta, and in Prince Edward Island such a will by one in service is valid even if the testator is under 21. In Quebec, where the French population is dominant, revocation of a will may be demanded by any interested party by reason of grievous injury done to the testator's memory by a legatee. Similar laws are found in other countries as a valid basis for disinheritance.

It is when we leave the States and Canada and go abroad that we meet the highest and most diversified hurdles.

The Latin-American countries present serious problems for several reasons. First, the testamentary age of the testator in many of these countries—where marriage occurs early—is fixed at puberty—usually 14 for the male and 12 for the female. Curiously enough, whereas puberty is deemed to qualify a male to make a will, in several of the Latin countries this status is not considered sufficiently potent to qualify him to witness such a document.

Moreover, there are more different kinds of wills in the Latin countries than prevail elsewhere. And the precautions are many. Nearly all recognize holographic wills. There is the open will, usually prepared by a notary and witnessed. The closed will is signed by the testator, sealed and delivered to a notary in the presence of resident witnesses, sometimes as many as five. The notary inscribes on the envelope the nature of the will, and the notary, the testator and the witnesses all sign the envelope. Some wills require as many as eight witnesses. As elsewhere, special provisions apply to those in service.

Several classes of persons are excluded from serving as witnesses or receiving benefits. In Chile, Colombia and Honduras servants may not be witnesses. There are "forced heirs"—heirs who cannot be disinherited except for cause—and the causes are many and varied. Refusal to ransom parents or children is one of the causes in several countries.

The effect of marriage or birth of children, and of divorce, on a will executed before such an event, differs in the various countries, just as it differs in the states.

In a few countries religion enters into the law of wills. In Israel, the validity in form of a will is governed by the law of nationality or religion of the testator. Wills of non-foreigners who are members of any recognized religious community are valid if made in accordance with religious law. In the case of foreigners, however, a will recognized by their national law will be recognized by the Israeli civil courts.

In Lebanon, the community—at least as regards wills—is divided into Moslem and non-Moslem (Christians and Jews), and each community is governed by different laws. In Liechtenstein, a ground for disinheritance is apostacy from Christianity. In Yugoslavia, a child may be disinherited for abandoning the Eastern Orthodox faith, as well as for leading an immoral life and declining to change his habits even after being requested to reform.

In Denmark and Norway, one under age may make a will, but it is not valid unless confirmed by the King.

In Guatemala, a closed will must be written on both sides of the paper, and every page signed, enclosed in an envelope and sealed.

In Haiti, only males may witness, and they must be of age, though at 16 they may execute a will.

There are no probate courts in the Netherlands, where such courts are needless, inasmuch as the precautions assure due execution of the document, and the beneficiaries decide upon the validity and construction of the will.

In Nicaragua, three persons 16 or over may witness a will in case of an epidemic.

In Sweden a minor at 16, and in Finland, one at 15, may dispose of what he or she has accumulated as a result of his or her own work.

In Syria legacies must be approved by the heirs.

Not surprisingly, the right of testamentary disposition in Russia is strictly limited.

In Scotland, the male children inherit first, in their order, then females.

The size of the country bears no relation to the size of the regulations controlling wills. Uruguay, the

smallest of the South American countries, has one of the most elaborate wills law in existence. This is also true of Switzerland.

Japan has the modern provision that the existence and effect of wills are governed by the law of the country of the testator at the time of execution, while the formalities are determined by the law of the place where the will was executed. The Philippine Republic has a similar provision. Finland and Western Germany provide for "wills of emergency". And Italy authorizes special wills made during prevalence of contagious diseases or in case of public calamity or accident. Greece has analogous provisions.

In Austria, simply enough, a will is valid if executed in accordance with the law in force at the time when, and at the place where, the will is drawn.

In Australia, too, the law is trim, although no provision is made for holographic or nuncupative wills. All that is required is that the will be in writing and signed in the presence of two or more witnesses, who must attest and subscribe the document in the sight and presence of the testator and each other.

In South Africa, also, the essentials are trig, but every page of the will must be signed by the testator and two competent witnesses, in the presence of each other.

In El Salvador women may not witness a formal will.

About half of the countries outside the United States and Canada, authorize, under different names, holographic wills, and in many nuncupative wills are valid.

In Bolivia, extra provisions have been made for Indians residing over one league from their cantons. In time of war soldiers may write on sand, earth or stone, but at least two witnesses must have seen them write.

In Costa Rica, and elsewhere, the accomplice of an adulterous spouse may not take by will.

These noted differences are, it goes without saying, merely illustrative; in no sense has comprehensiveness been aimed at here. Still, the greater the divergencies, the greater the need for some measure of universality.

Now, how and by whom this audacious project for universalization is to be prosecuted, or even launched, is, of course, one of the multifarious problems that beset the program. The chief mission hereof is to pose the question and present a few supporting arguments as well as some of the visible obstacles—in short, to open the debate and invite discussion.

The campaign for pursuing Part One of the program is largely dependent on such organizations as the American Bar Association and the National Conference of Commissioners. Perhaps Part Two can be undertaken by an organization of international range and perspective such as the International Bar Association. Perhaps, also, the new and unique College of Europe, located at Bruges, Belgium, will find the theme of interest, inasmuch as its dedicated scholars and students are presumably exploring—*inter alia*—the unification of legal systems and the transition from national to supranational law.

Once a get-together is contrived concerning at least the rudiments of a universal wills law, maybe other branches of the juristic tree can be considered. The minimum to be aimed for is (1) the adoption of Section 7 of the Model Act, or its equivalent, and (2) universality regarding foreign probated wills.

Is this program impossible or impractical? General Carlos Romulo, of the Philippines, author of the recently published *Crusade in Asia*, tells of having advocated a unified Asian front against communism four years before SEATO and was told by the United States that such an idea was impossible and impractical. Thus, the impossible and impractical of yesterday becomes the practical reality of today. "Naught venture naught have."

How Large Is the Budget?

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wage earner, it would put more than a $1000 in every wage earner's pocket annually.

It is over eight times the amount spent for all purposes for elementary and secondary education in one year.

It is between six and seven times greater than the income before taxes of all corporations in the United States with earnings of $10,000,000 or more during the year.

It is over three times larger than the profits before taxes of all manufacturing companies in the United States for 1955. It is between six and seven times as great as all automobile, motor truck and bus sales in the United States in 1955.

Federal spending is over four times as great as all spending for housing in the United States in 1955.

The interest on the national debt alone, an annual charge of between 6.5 and 7 billion, is greater than all money spent on private education and research and religious and welfare activities for a year.

In the past decade, we have been assailed by billion dollar figures from governmental sources so frequently that the figures have little meaning. It is only when we translate these figures into comparisons with other economic data that they become meaningful and capable of understanding.

The federal budget remains the giant among the pygmies. It is so monstrous as to defy reasoned comment. There is no way to get hold of it. It is too complicated and vast for any one mortal mind to conceive it in its entirety.

The Frankenstein monster of our own creation has escaped the bonds of control. It dominates rather than being dominated. It commands rather than responding to commands. It governs the economy with its taxes and concomitant expenditures. It stands as an incomprehensible monstrosity of America's creeping retreat from political and economic control to tyranny through ignorance and bureaucratic control.

Explosion Damage Cases

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sary invasion of the province of the jury. The general rule of evidence is that testimony of witnesses must be confined to concrete facts perceived by the use of their senses as distinguished from opinions and conclusions deducible from evidentiary facts. If this rule were to be maintained there would be little competent testimony in vibration damage cases for the senses are completely untrustworthy in perceiving the most commonly claimed agent of destruction, earth borne vibrations. Such vibrations can be calculated with extreme accuracy by mathematics if certain data are known or measured even more accurately with a seismograph, but a person, even a highly trained person, can no more estimate with his senses the amplitude and speed of a vibration which may pass through the earth under him than he can estimate the speed and voltage of the electricity passing through a high tension wire over his head.

As mentioned above some experts are so busy that they relegate the gathering of the field observations and making tests to their employees and then attempt to testify in court from these field notes. "Where witnesses of proper skill and experience have formed their judgment from personal examination of the subject of the controversy, their opinions are generally worth more than those elicited by hypothetical questions, which may or may not state all the incidents and circumstances necessary to form a correct conclusion. In many instances where the expert has testified to his own observations, he has been permitted to state his opinions based partly on facts stated in a hypothetical question and partly on those which he himself has testified to." "It is necessary, according to the great weight of authority, that an expert witness giving an opinion upon facts of his own knowledge or based upon his own observations first testify to the facts upon which his opinion is based" (*Ibid.*, # 793-4).

It is of prime importance that the questions put to an expert be framed in exactly the proper manner. This subject is so complicated that an answer might well be received that appears to support the adversary. The main point of controversy in a recent case developed around the question as to whether earth or rock vibrated the most under similar conditions. The attorney who brought the case asked, "Can rock vibrate as much as overburden [earth]?" The answer had to be "yes". If he had only added, "Under similar conditions" the answer would have been "no". It is advisable to rehearse the questions with the expert before the trial and have them worded according to his suggestions. Isn't there an old rule which suggests that a question never be asked to which the answer is not known?

Commercial blasting is generally so well controlled with the purpose in mind to prevent damage to property and injury to persons that very little actual damage occurs. In the few cases where the damage is self-evident the insurance carriers pay reasonable claims promptly. In addition to this genuine experts will testify only to scientific truth, which all results in these experts usually finding themselves on the side defending against unfounded damage claims.

Such defense is properly divided into two sections: the first is negative and develops the facts that the explosion and the resultant vibratory waves could not have damaged the structure. The other is positive and traces the real cause of the damage. "Negative evidence, that is, evidence that a fact did not exist, that a thing was not done, that an alleged occurrence did not happen, etc., while weak and not sufficient to overcome positive testimony that an alleged fact did exist, is admissible when, and only when, the competency of the witness and his knowledge of the matter of which he speaks are established." "The rule is that where witnesses are of equal credibility and there are no extraneous circumstances affecting the weight of their testimony, testimony that a certain event happened or that the witness saw or heard something at a particular time or place is of more weight and value as evidence than other witnesses, with the same opportunities, who state that they did not see or hear anything at the time or place." (*Ibid.* #254, 1186). In brief the positive nature of the evidence should be emphasized.

In order to strengthen your own witness and discredit those of the adversary it is desirable to introduce hearsay evidence and this will tax an attorney's craftsmanship to the extreme. If scientific fact and laws of nature are to be used to defend against fantastic claims they first must be established on a trustworthy basis. Scientific fact and the laws of nature relating to explosives engineering, seismology and architectural engineering are as unknown to the average fact-finding body as are those of nuclear physics. The unsupported word of even the finest expert witness is not enough to give credibility to these facts and laws, especially when contradicted by an incompetent witness. Supporting and deciding evidence must be introduced in the form of scientific books. Many courts shy away from the introduction of scientific books,

but there are two conditions under which this is properly done.

"A general exception to the rule excluding scientific books as independent evidence exists with reference to books or publications on topics of exact science which contain statements of ascertained facts rather than opinions, or which, by long use in the practical affairs of life, have come to be accepted as standard and unvarying authority in determining the action of those who use them. Publications of this kind, when duly authenticated are generally admissible as evidence" *(e.g.,* 20 AM JUR., *Evidence* #967). Counsel should, by all means, familiarize himself with the law and usage in this respect in his jurisdiction, for it is most important.

"It is admissible under certain conditions to also use scientific books which are *not* on a topic of exact science. It is generally conceded that scientific books and publications other than those on a topic of exact science are not admissible in evidence as proof of facts stated therein. Experts in giving opinion testimony may, however, refer to scientific authorities and state the results thereof. Such reference is not deemed an introduction of the books in evidence but as a corroboration of their own opinions. Thus, it is held that the expert may certify his testimony by reference to standard scientific works" *(e.g.,* 20 AM. JUR., *Evidence* #797; *Scott* v. *Astoria & Co. River R. Co.* 43 Ore. 26, 72 Pac. 594, 62 L.R.A. 543, 99 Am. St. Rep. 710).

Free Enterprise and Altruism

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pensable dynamics of self-help. The real offset to this is "give". In this direction the United States has gone far and it is possible that it will extract some of the curse of acquisitiveness by thinking of it as a step in giving–giving until it hurts. Stanley Baldwin in giving to the British Empire remarked that a rich man can never be generous. In this country, the procession of public benefactions was probably led by the gifts and philosophy of Andrew Carnegie who defined the duty of a man of wealth–"to set an example of modest unostentatious living, shunning display or extravagance; to provide moderately for the wants of those dependent on him; and after doing so to consider all surplus revenues which come to him simply as trust funds–for his poorer brethren". A contemporary, the senior Rockefeller, amassed a huge fortune in part at least by methods since outlawed, while his son has devoted largely of his life and inheritance to philanthropy. The public conscience of his day–partly from envy–first condemned this massive accumulation but later became reconciled by the magnificent benefactions to which it was put. Others have since followed suit.

In 1952, Americans contributed five billion dollars to philanthropy. That amount varies with the success of the free enterprise system but the percentage of national income so contributed does not rapidly increase.

"It is one thing", said Pope Leo XIII, "to have a right to the possession of money and another to have the right to use money as one pleases." Nietzsche does not make this easy when he says "How much harder it is to give properly than to take properly." We encourage giving by providing that charitable contributions may be deducted from taxable income. If you use the money for social good, the Government takes less of the remaining income. The richer you are, the more substantial is the inducement. That is one way of siphoning off funds for social welfare.

Nor is the obligation to share of recent birth or parochial. By the early Egyptians it was recorded: "He gave bread to the hungry; water to the thirsty, raiment to the naked; he gave a boat to the man who had none." The Moslem world expressed it this way: "Prayer carries us halfway to God, fasting brings us to the door of his palace and alms gains us admission."

In more modern language, James Stephens wrote:

Let the man who has and doesn't give,
Break his neck and cease to live.

Christian Philosophy . . . *A Humanitarian Heritage*

Over a thousand years before Christ, in at least one country this philanthropic ideal took the form of a positive political concept "to hold back the strong from oppressing the weak". This approach to social problems proved to be a humanitarian heritage. When Christianity faced the acerbities of the industrial era, Christian philosophy then picked it up and to a large extent has been responsible not only for the growth of private philanthropy but for writing welfare statutes.

The philanthropic movement, therefore, is based on both involuntary and voluntary giving. The Christian conscience demands certain social corrections and remedies whether they be reached through private or public sources. If economic acquisitiveness is more and more conscious of this philanthropic obligation, we may develop a reconciliation of motives which will yield a maximum of temporal good with a maximum of spiritual good. If we can ever keep before us the thought that strength can never shake off its debt to weakness–that excess wealth carries an obligation to aid the less fortunate–we should be able to has been softened by the idealism of

work out a satisfactory basis for living. But here we must remember it is all a matter of degree and not of rigid principle. "Ay, there's the rub."

So we are fortunate to be living in an era when progressive legislation, providing for involuntary giving, goes hand in hand with voluntary giving, to relieve the burdens of the weak and unfortunate and thus strengthen the practice of humanitarianism. While this process of involuntary giving through taxation is still being debated as something equivalent to robbery and confiscation, it is hardly conceivable, unless our democratic government collapses, that this process will ever be abandoned. The only vacillation will be the wavering line between dependence on voluntary giving and dependence on involuntary giving.

There is also another aspect to this picture. If the refinements and gentler and more civilized practices abound in a country with a sound economy and philanthropic institutions—which seems to be the fact—then one might cynically remark that materialism strengthens some important Christian practices. What I mean to suggest is that materialism as well as religion may often be the fertilizer of some social virtues. The law of combat becomes more gentle, refined and civilized. It contains the same dynamics as the unreformed selfishness, but is purged to some extent of the old barbarities and brutalities. Callousness and helpless resignation to suffering diminish where there are facilities to alleviate suffering. Perhaps that is what one teacher meant when he declared "God is making commerce his missionary."

In this way, we aim to prevent some men of unusual talents from cumulating strength without limit by a kind of geometrical progression and using it to oppress the less fortunate. If we attribute this trend in part at least to the Christian dictates of brotherhood, it furnishes an outstanding example of how the conflict between competitive selfishness religion and how religion has accepted the concept of individual selfishness in economics, each without destroying the other.

The actual operation of these dynamic forces is being more clearly defined in some areas by the organized supporter of conflicting views in the economic field. The A.F.L.-C.I.O., which now speaks more authoritatively than ever for labor, and the Chamber of Commerce of the United States and the National Association of Manufacturers, broadly representative of management throughout the nation, are struggling to capture the minds of all of us to support their way of thinking.

One group demands tax relief by broader exemptions for those in the lower income tax brackets, while the other group would reduce corporate taxes and relieve those at the top of the economic ladder. At one time it was urged that all incomes above $25,000 be confiscated. More recently, because the tax load on the rich was so nearly confiscatory, a constitutional amendment has been proposed in the House and Senate to limit to 25 per cent the top rate which the government could take of the taxable income of any individual or corporation, or if this did not yield sufficient income for government requirements, to limit the spread between the lowest rate and the highest rate. It seems obvious to the proponents of this amendment that tax rates sharply graduated—almost to confiscation at the top—lessen the incentive to work, save and invest and in that way block economic expansion. Some prominent members of the conservative group, including a group of scholars contributing learned essays on liberty, contend that it is sheer robbery to tax a rich man for philanthropic activities that do not directly benefit him. Equally startling is a program espoused by A.F.L.-C.I.O. that "at all governmental levels" taxes should be based "on ability to pay" and that "unfair sales taxes" should be abolished. Even though I am unwilling to believe that the phrase "ability to pay" as so used was intended to carry the ominous meaning of its historic utterer, the acuteness of this political issue is nevertheless disturbing.

Too Much Ideology . . .
Too Little Practicality

As between the school that seeks egalitarianism through graduated tax rates and the school which would put no legal restraints on the economic ruthlessness and inequities of free enterprise, there is too much reliance on ideology and too little concern with practicality. The first group dreams of equality without impairing free enterprise. It condemns socialism but adopts a goal which cannot be secured without socialism or its equivalent. The extreme wing of the second group predicates its uncompromising attitude on the contention that every citizen is entitled to all he has or earns except for his tax obligation to support law and order.

And here are other examples of conflicting viewpoints in this area. One group would extend the coverage of social security and minimum wage laws to a point opposed by the other. In the field of union regulation, one group would permit the union shop in order to strength-

en the union, while the other group has established an organization to promote the passage of so-called "right to work" laws in order to relieve the non-union man from union pressure. At one time the employers used to dictate how their employees should vote but this was later made unlawful. Not so long ago Cecil B. DeMille was driven from the union and prevented from appearing on the air because he would not contribute to a certain political campaign. Today this fundamental issue of union security is most acute.

With the wealth of experience behind us it would seem almost irrational to believe that it is practicable to erect a sound social structure on rigid ideologies. "Nothing is more certain in modern society", states a Supreme Court decision, "than the principle that there are no absolutes."

Co-existence between the motivations of commerce and Christianity is producing good results, but enlightenment and moderation are essential if we are to avoid destructive extremes. In the atmosphere of democratic politics we will undoubtedly wobble back and forth, but the outstanding encouragement is the widespread vigor of economic education. No one would impair our economic health and even the socialists would hesitate to impale our economy on the altar of egalitarianism, once they are convinced of the inevitability of bad results. Both sides, well versed in the principles of economics through their research bureaus, seek to support their cause by economic laws and facts. The economic bulletins issued by A.F.L.-C.I.O. to its members—even when slanted—are often masterpieces and evince confidence in the effectiveness of economic education and the educability of their members. Possibly we are to become a nation of economic experts just as the founders of this nation were outstanding as political philosophers.

The forces which are developing an increasing number of labor leaders and corporate executives with a broader understanding of economic, social and humanitarian considerations, and improved attitudes at the bargaining table and in industrial relations, are difficult to analyze. The part which Christian ideals play may not always be apparent on the surface. Karl Marx called religion "The opium of the people" and the I.W.W. in the first quarter of this century carried banners "No God, No Master", yet both of these crusades were seeking greater equality of opportunity for all. Today, when liberals, labor union journalists, and speakers before committees of Congress advocate economic policies more in keeping with Christian ideology, they would startle their audience if they based their arguments on appeals to religious emotions. William Jennings Bryan tried the emotional appeal when he orated: "You shall not press down upon the brow of labor this crown of thorns; you shall not crucify mankind upon a cross of gold." But famous as was this oration, that type of appeal has not been generally flattered by imitation. So far as my reading discloses the present emphasis is on practical economics.

The emotional appeal has waned before the onward march of humanitarianism in industry. The rebellious attitude has moderated on both sides. While human nature has not changed appreciably during this century, its reactions and responses improve in a rapidly improving environment.

Water and fire are among the great friends of mankind when properly controlled but through floods and conflagration can become devastators. So it is with selfishness in industry. We cannot dispense with it, as the teachings of Christ would dictate, but we cannot omit proper defenses against its potential devastations. On the other hand it seems to me that in a democracy one of the greatest perils is that the majority, led by demagoguery (implemented by media for mass education), will hobble the talented to a point which will seriously impair economic efficiency and the social benefits which flow from it. If, as is written by Joseph Schumpter, "profits boil down largely to the payment for keeping a jump ahead of your competitors through innovation"; or as Paul Samuelson puts it profits are "the temporary return to daring but unforeseen innovation", we must not bait the hook too sparingly. On the other side of the coin there seems to be nothing on the domestic horizon to suggest that the underprivileged is in danger of being again pushed into the background.

The enormous advantages of our system of practical compromise must be clear to all who stop to think. It is based on no ideology except the greatest good to the greatest number. It is neither individualistic nor socialistic. It aims to attain the beneficent objectives of each. It is flexible with democracy at the helm and its lasting success will depend on the capacity of the electorate intelligently to measure the social value of economic leaders and the desirability of permitting them to earn ample rewards for their exceptional service. The freedom of talented leaders to serve society, by serving themselves, must not be sacrificed on the altar of socialism or the welfare state. James Oglethorpe's slogan for Georgia, *"Non tibi sed aliis"*, is not yet practical.

What will the talented yield to secure the tolerance and co-operation

of the masses? What inequalities will the masses tolerate to enjoy the benefits of the skills and leadership of those who have special talents? These are questions of practical reciprocity intimately involved with the future of religious teachings. The answer to them must be found through trial and error. We should forget the old slogans, shibboleths and taboos. Arnold Toynbee summarizes this approach. The golden mean in economics, he writes, "would be something that was neither unrestricted private enterprise nor unmitigated socialism—salvation cometh neither from the East nor from the West".

Federal Pre-Emption

(Continued from page 134)

effect on the course of decision. Its direction that prior acts of Congress shall not "be construed to supersede State laws by implication unless there is a direct and positive conflict between an express provision of such Federal Act and such provision of the State law so that the two cannot be reconciled or consistently stand together," does not materially differ from standard expressions of the judicial test for supersession. Thus it has been said that "the repugnance or conflict should be direct and positive, so that the two Acts [can] not be reconciled or consistently stand together."[44] Another, more recent, expression is that "Congressional intention to displace local laws . . . is not . . . to be inferred . . . unless clearly indicated by . . . considerations persuasive of the statutory purpose."[45] From within the current decade comes the phrasing that decision is to proceed on "the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress."[46] These differences in verbiage are not impressive. We do not deny that counsel in argument, or critics in drafting meticulous law review comment, might make something of them. Our point is that judges, convinced that the enacting Congress really had intended to supersede state law, will not be utterly perverse if they find, as they are likely to find, that the language of the Smith proposals does not repeal or modify that intent.

As to that part of the proposal which deals with the construction of congressional enactments subsequent to the date of the Smith Resolution, if enacted, we see even greater likelihood that it will not have the effect proposed. Indeed, we doubt whether it is possible by a statute of this sort to control effectively the construction of legislation to be passed *in futuro*. We do not pause to discuss difficult problems of construction which may arise in connection with the question whether any valid congressional enactments ever involve other than "a power expressly granted to the Federal Government by the Constitution of the United States". We pass directly to questions which arise out of basic constitutional doctrine concerning the legislative power.

It is a truism that one 'egislature may not limit or abridge the power of its successors to change the law.[47] Of two repugnant statutes, the latter prevails over the prior,[48] "even though there be no express repeal"[49] and "the result is reached by implication alone".[50] The "question whether a statute is repealed by a later one containing no repealing clause, on the ground of repugnancy or substitution, is a question of legislative intent to be ascertained by the application of the accepted rules for ascertaining that intention".[51] Such rules require "a considered weighing of every relevant aid to construction".[52]

These established principles show clearly how unlikely it is that the enactment of the Smith Resolution would give the states protection against federal pre-emption over that which now they have. It is quite clear that any subsequent Congress would be free to indulge in pre-emptive activity without confining itself to the Smith Resolution formula.[53] All that would be necessary would be the presentation of a situation which the court would take as evidencing a clear intent to supersede state law. But that is exactly what must be shown under the existing doctrine, as we have outlined it previously. Hence we doubt seriously that the Smith Resolution would be likely to result in judicial decision more favorable to "state's rights" than would be rendered without it.

Moreover, is the matter properly to be dealt with by rule of thumb? The Smith Resolution itself recognizes that it may be desirable in particular instances that Congress pre-empt the field by its legislation, to the exclusion of state law. However, it seems defective in that, literally applied, it leaves to the chance of congressional attentive-

44. See *Sinnot* v. *Davenport*, 22 How. (U. S.) 227, 243, 16 L. ed. 243, 247 (1859).
45. See *Maurer* v. *Hamilton*, 309 U. S. 598, 614, 60 S. Ct. 726, 734, 84 L. ed. 969, 980 (1940).
46. See *Rice* v. *Santa Fe Elevator Co.*, *supra*, 31 U. S. at 230, 67 S. Ct. at 1152, 91 L. ed. at 1459.
47. *Toomer* v. *Witsell*, 334 U. S. 385, 68 S. Ct. 1156, 92 L. ed. 1460 (1948), footnote 19 to opinion. See CRAWFORD, STATUTORY CONSTRUCTION, 1133 (1940).
48. *McKee* v. *U. S.*, 8 Wall. (U. S.) 163, 19 L. ed. 329 (1868).
49. See *U. S.* v. *Fisher*, 209 U. S. 143, 145, 3 S. Ct. 154, 155, 27 L. ed. 885, 886 (1883).
50. See *Barney* v. *Dolph*, 97 U. S. 652, 656, 24 L. ed. 1063, 1064 (1878).
51. See *Posadas* v. *National City Bank*, 296 U. S. 497, 504, 56 S. Ct. 349, 352, 80 L. ed. 351, 356 (1936).
52. See *U. S.* v. *Dickerson*, 310 U. S. 554, 562, 60 S. Ct. 1034, 1038, 84 L. ed. 1356, 1362 (1940).
53. *Cf. Kellogg* v. *City of Oshkosh*, 14 Wis. 623 (1861).

ness and of congressional draftsmanship whether consideration is given to this question and whether, if it in fact is given, it will be of legal effect. But the true desideratum is that each case should be dealt with consciously, in accordance with its own merits. In respect to each piece of legislation, Congress should be apprised of its intended effect on state law and should make a conscious and a manifested decision as to that effect. To this end, we suggest that the rules of each house of Congress be amended to provide that a committee which reports a bill shall include in its report an express statement whether there are state laws dealing with the subject of the bill: the extent, if any, to which the bill is intended to affect such laws; and, as well, whether, and to what extent, it is intended that future enactment of state legislation in the field shall be precluded. Congress now has adequate facilities at its command for the performance of this task.[54] Hence there can be no valid objection to this recommendation on the ground that it imposes an overly onerous burden.

The advantages of the proposal, we suggest, are many. The most obvious, perhaps, is that it would eliminate the occasion for the criticism of the Supreme Court of which we spoke at the outset of this paper. No longer would the judges be forced to deduce, as best they may, from vague phraseology, from the more or less apparent general legislative design, from their own views of the extent to which congressional policy may be hindered or may be advanced by state legislation, and from all the other factors which from time to time have been invoked to aid the process of decision, what was the intent of Congress. That body will have stated its intention, as to this particular legislation, and that will be that. That source of litigated issues before the Supreme Court will have been reduced, if not eliminated. We phrase it in this manner because on occasion it may happen that inept phrasing still may leave congressional intent obscure.

But the other advantages are even more desirable, we think. Increasingly our problems of government do not fit into an easy dichotomy of state versus federal competence. To a large degree, the resources of both the nation and the states are needed for their solution. A proper balancing of the factors affecting this cooperation, or leading to the conclusion in a particular instance that this is unnecessary, is essential to intelligent action by Congress. Our proposal would facilitate this process. Moreover, disregarding the question of cooperative federalism for the moment, the ever increasing area in which federal regulation is constitutionally permissible, due to our growing economic and social unity, makes it important that, in each instance, we should weigh carefully the merits of state or national rule in respect to each legislative proposal. And, if, as sometimes happens, there is a federal withdrawal from an area formerly regulated it will facilitate judicial determination of whether states may step into the gap, if Congress specifically indicates its will.[55]

54. See Ford, *The Legislative Reorganization Act of 1946*, 32 A.B.A.J. 741 (1946); Galloway, *Congress in Action*, 28 NEB. L. REV. 493 (1949); Jones, *Billdrafting Services in Congress and the State Legislatures*, 65 HARV. L. REV. 441 (1952).

55. *Cf. Guss v. Utah Labor Relations Board*, —Utah 2d. —, 296 P. 2d 733 (1956).

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